SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

JANUARY TERM, 1976

No. 75-1168

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MELANIE LUECK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

JANUARY TERM, 1976

No.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MELANIE LUECK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Southern Pacific Transportation Company, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on November 18, 1975.

OPINION BELOW

The opinion of the Arizona Court of Appeals is reported at 22 Ariz. App. 90, 523 P.2d 1327 (1971). The opinion of the Supreme Court of Arizona, vacating the court of appeals opinion, is reported at 111

Ariz. 560, 535 P.2d 599 (1975). The supplemental opinion of the Arizona Supreme Court is unreported.

JURISDICTION

The Supreme Court of Arizona, in its first decision, determined all issues before it except petitioner's motion for new trial, which was remanded to the trial court for an evidentiary hearing on issues regarding respondent's production of an expert witness who committed perjury at trial. A timely motion for rehearing, addressed to all issues decided by the court in its first opinion, was denied on June 3, 1975 and the memorandum in support of the motion was stricken from the record.

The mandated hearing was held on June 26, 1975 and the trial court decision rendered on August 8, 1975. Pursuant to procedures established by the Arizona Supreme Court, petitioner timely filed its objections to the findings of the trial court.

The Supreme Court of Arizona, after oral arguments were requested and denied, issued a supplemental opinion on October 7, 1975. A timely motion for rehearing was denied on November 18, 1975, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Arizona's refusal to consider or review the record of a trial court proceeding, held pursuant to its own mandate and

directed to essential issues in controversy, denied petitioner its constitutional right to a meaningful appeal and due process of law?

2. Whether the Supreme Court of Arizona denied petitioner procedural due process by refusing it the right to argue its position orally at any stage subsequent to the decision rendered in its favor by the Arizona Court of Appeals and by striking the only brief on the merits filed by petitioner with the Supreme Court?

3. Whether the Supreme Court of Arizona's classification of petitioner according to its wealth, measured in terms of legal staff, police officers and investigators available to it, for the purpose of ascertaining whether due diligence was exercised in discovering that the respondent's reconstruction expert was an impostor, and failure to allow the taking of relevant depositions denied petitioner of equal protection and due process of law?

4. Whether petitioner was denied substantive due process by the Supreme Court of Arizona's decision that the burden of discovering that an expert witness is an impostor rests on the adverse party and that a jury verdict premised on perjured testimony is not inherently of such character to give reasonable assurance that upon retrial a different result would ensue?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This wrongful death action was instituted by the widow of William T. Lueck for his death which occurred when the motor vehicle he was driving collided with petitioner's train.

The respondent presented a reconstruction expert, Mr. Allen W. Dickinson.[1] The witness testified that: he held both B.A. and M.A. degrees from Cambridge University, Cambridge, England as well as a fellowship in dynamics; he was a member of the Comet Investigation Committee; he had published an article with the English Government entitled "Fatigue Failure on the Comet Airplane"; he was a member of the VonBraun aerospace team; he was employed by Mitchell Engineering; and, he was employed by Harvey Aluminum. Mr. Dickinson, the sole accident reconstruction expert presented by respondent, testified that the Southern Pacific train, according to his calculations, was traveling at speeds up to 70 m.p.h. at the time of the collision; this is 10 m.p.h. in excess of the lawful maximum speed set by the city of Willcox.

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[1] Although this controversy had been pending for six years, the expert witness was produced by the respondent only six weeks before trial.

The jury returned a verdict in favor of respondent amounting to $3,080,000; $2,000,000 compensatory damages and $1,080,000 punitive damages.[2]

On appeal, the Arizona State Court of Appeals reversed the trial court and remanded for a new trial. The intermediate court held that an instruction on gross or wilful and wanton negligence was unsupported by the evidence and erroneously given.

Respondent, on October 8, 1974, filed a petition for review and requested

> "pursuant to Supreme Court Rules 4, 6 and 25, oral argument on the above entitled matter."

This request was denied.

While this controversy was pending before the Supreme Court of Arizona, the petitioner discovered that the respondent's reconstruction expert, Allen W. Dickinson, was an impostor. The perjurer had not received degrees from Cambridge University and, at trial, had perjured himself as to his qualifications, past employments, and professional associations. This was immediately brought to the attention of counsel for respondent and subsequently, a request to supplement the record on appeal was filed with the Arizona Supreme Court.

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[2] This award was predicated upon evidence which reflected the following net income of the decedent:

1961	1,676.87
1962	4,417.57
1963	5,834.37
1964	1,121.61
1965	(12,347.38) loss
1966	(489.95) loss

The Supreme Court of Arizona, reversed the appellate court decision, and affirmed the judgment of the trial court. It reserved ruling on petitioner's motion for new trial, which was based upon the discovery of the expert's perjured testimony, and ordered the trial court to hold a hearing to determine

> "pursuant to Rule 60(c), whether the asserted newly discovered evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., and whether it is of such a character as to give reasonable assurance that it will work a different result upon retrial." *So. Pac. Transp. Co.* v. *Lueck,* 111 Ariz. 560, 577, 535 P.2d 599, 615-16.

On June 26, 1975 the trial court held the mandated hearing. Three witnesses were sworn and one hundred pages of testimony recorded. The trial court, in its "Report and Decision", stated that

> "the railroad company had numerous special agents, police officers and a large legal staff in its employ for the purpose of investigating the facts of all cases, and had unusual facilities for discovering the truth and the real facts and for preparing cases for trial."

Based upon this finding, the trial court concluded that due diligence was not exercised. Prior to the hearing and in an effort to demonstrate its exercise of due diligence, petitioner attempted to depose the expert impostor and the party who supplied the false witness to respondent's counsel; the trial court prohibited petitioner from taking those depositions.

Petitioner then filed its "Objection to Finding, Judgment and Determination of Trial Court" pursuant to the special procedure established by the Arizona

Supreme Court. 111 Ariz. at 577, 535 P.2d at 616. Petitioner contended:

1) that any determination of due diligence which included considerations such as the size and wealth of the party denied it of its constitutional right to due process and equal protection;

2) that the court could not properly rule on the question of due diligence until the deposition of respondent's impostor and that of his supplier were taken; and,

3) that shifting the burden of assuring a witness's authenticity from the party presenting the witness to the adverse party, "denied this petitioner's constitutional right to due process...." (Objection to Finding, Judgment and Determination of Trial Court, p. 10.)

Simultaneously, the petitioner filed a motion with the Supreme Court of Arizona requesting that the transcript of the June 26, 1975 hearing be designated as part of the record and that a time be set for oral arguments.[3] The petitioner stated the constitutional deprivation which it would sustain if the court failed to review the original transcript of the hearing as follows:

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[3] The motion requested an order:

"1) Granting and setting a time for oral argument in this matter;

2) Granting the appellant the right to file a Reply Memorendum to the Response of the appellee to the Objections filed herewith to the Trial Court's Findings, Judgment and Determination dated August 8, 1975.

3) Designating as part of the record in this matter the Transcript of the hearing held on June 26, 1975."

> "that any determination of this case without a thorough review of the Transcript of June 26, 1975 hearing would constitute a violation of the [petitioner's] rights.
>
> * * * *
>
> Due process under the Federal and State Constitutions requires . . . that the necessary record be completed so that the Court will have a complete record before it prior to making its determination." (Motion, p. 2.)

The Supreme Court of Arizona denied both petitioner's motion for oral argument and request to file a supplemental memorandum. The Supreme Court of Arizona failed to rule on petitioner's motion to supplement the record; in fact, the court failed to designate the transcript of the June 26, 1975 hearing as part of the record.[4] Thus, the court failed to review the testimony of the hearing held pursuant to its own order, prior to rendering its supplemental decision of October 7, 1975.

In the supplemental opinion, the Supreme Court of Arizona affirmed the trial court's determination without reference to the constitutional objections raised.

The petitioner, in its second motion for rehearing, once again clearly placed the following constitutional issues before the court:

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[4] The failure of the Arizona Supreme Court to review this Transcript is conclusively established by the letters from the Clerk of the Trial Court having possession of said Transcript. Appendix. (These letters were attached to the second motion for rehearing filed with the Arizona Supreme Court.)

1. the petitioner contended that

> "[it] was deprived of its constitutional right to equal protection and due process of law because the Supplemental Opinion promulgates the doctrines a) that a party having a large investigation staff is held to a higher standard of due diligence and b) that the burden of determining the authenticity of the credentials of an expert witness rests solely on the adverse party, rather than the party tendering the witness." (Motion for Rehearing, p. 3.);

2. the court's failure to review the record of the mandated hearing prior to issuing its opinion effectively denied petitioner of procedural due process. Specifically, the court was requested

> "[t]o rehear and reconsider its decision, as set forth in its Supplemental Opinion which affirmed the judgment of the trial court as set forth in its Report and Decision, on the grounds that the record of the June 26, 1975, hearing was not before this court, and therefore, this court could not determine whether the trial court's decision was supported by the record; consequently, appellant was denied its constitutional right of procedural due process." (Motion for Rehearing, p. 10.); and, the petitioner contended that

3. "[shifting] the burden of determining the authenticity of the credentials of an expert witness rests solely on the adverse party, rather than the party tendering the witness denied petitioner of due process of law." (Motion for Rehearing, p. 23.).

Petitioner once again requested oral argument; this motion was denied. The Supreme Court of Arizona also denied petitioner's motion for rehearing on No-

vember 18, 1975 without addressing the constitutional issues repeatedly placed before it by this petitioner.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Has Promulgated the Doctrine, Heretofore Foreign to the Common Law of the United States, That an Appellate Court Need Not Review the Record Prior to Rendering Its Decision.

The requirement of due process of law is not confined to proceedings in the trial court but includes proceedings on appeal in state court. *U.S.* v. *Mills,* 21 F. Supp. 616 (E.D. Penn. 1937).

This controversy was remanded to the trial court to determine whether the petitioner exercised due diligence in discovering that respondent's sole reconstruction expert was a perjurer; a transcript of those proceedings was made.

The petitioner, on proper motion, requested that the transcript be designated part of the record in order that the Supreme Court of Arizona could review the entire record prior to rendering a decision. The court refused to rule upon this request and based its decision on the trial court's "Report and Decision" rather than reviewing the transcript of proceedings.

The law of Arizona is clear that a memorandum opinion of the trial court is not a part of the record on appeal. *Robinson* v. *Herring,* 75 Ariz. 166, 253 P.2d 347 (1953). In disregard of this basic maxim, the Supreme Court of Arizona refused to designate the original transcript part of the record and failed to review the evidence prior to rendering its decision.

The adversary appellate system is predicated upon an appellant's opportunity to persuade a reviewing

court that the legal conclusions of a trial court are erroneous; the starting point of such contentions is the transcript of the proceeding. *Gardner* v. *California,* 393 U.S. 367 (1969). Without the benefit of a transcript, a reviewing court cannot determine whether the lower court's conclusions are supported by the record.

It is elementary that a court which renders a decision prior to receiving all the evidence deprives the litigant of property without due process of law. *Rosenberg* v. *Baum,* 153 F.2d 10 (10th Cir. 1946). The Supreme Court of Arizona's failure to review the transcript of proceedings, which it had ordered, reduced the proceedings to a most perfunctory level. Not only does this petitioner possess the constitutional right to be heard, but that proceeding must be meaningful. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

The Supreme Court of Arizona's affirmation of the trial court's findings without meaningful review of the underlying evidence is in blatant disregard of this petitioner's constitutional right to due process of law; approval or assent by the Supreme Court of the United States to such procedures would be destructive to the integrity of the adversary system.

2. The Supreme Court of Arizona's Refusal to Hear Oral Arguments, Once Properly Requested, and Striking Petitioner's Only Brief on the Merits Filed with the Court Denied Petitioner of Procedural Due Process.

After the court of appeals reversed the trial court judgment against petitioner for $3,080,000.00, the respondent, pursuant to Rule 4, 6, and 25 of the Rules of the Supreme Court, filed a Petition for Review and requested oral argument.

Petitioner relied on that request; however, oral argument was not allowed. Rule 6 provides:

> "After the service and filing of briefs as authorized by these Rules, either party, upon timely request as provided by Rule 25, *will be heard orally*. The appellant will be heard for not more than fifty minutes and the appellee for not more than forty minutes, unless for special reason additional time is granted by the court. Counsel appearing as amici curiae shall not be heard except when permitted by the court and then for such time only as the court prescribes." (Emphasis Added.)

Despite the request being made pursuant to Rule 25 and the mandatory language of the Rule, oral argument was not allowed.

Without the benefit of oral argument or briefs, except those filed below, the Supreme Court granted review and rendered its decision cited *supra*.

Petitioner then filed its first motion for rehearing again requesting oral argument. This request was denied. The request was renewed in a motion filed simultaneous with petitioner's Objections to Findings, Judgment and Determination of Trial Court. This request was also denied. Oral argument was requested by petitioner, for a third time, on its second motion for rehearing. This request, as the others, was denied.

Charles C. Bernstein, a former Chief Justice of the Arizona Supreme Court stated that:

> "Oral argument is an excellent opportunity for an attorney to bring his case to the undivided attention of the Court. It is a time when both he and the Court can assure themselves that the issues of the case are thoroughly understood by

> the Court . . . . As a general or perhaps universal rule, counsel should not submit a case for decision without oral argument, and deprive himself of this opportunity to state his position before the Court." Bernstein, *The Disposition of Civil Appeals in the Supreme Court,* 5 Ariz. L. Rev. 174, 187 (1964).

Petitioner was consistently denied its right to oral argument in spite of the unequivocal language of the Supreme Court Rules; that refusal precluded petitioner from exercising its constitutional right to present its position to the court.

Once the Supreme Court of Arizona reversed the court of appeals petitioner filed, pursuant to Rule 47(a), Rules of the Supreme Court, a timely motion for rehearing; this motion was stricken from the record as "disrespectful and abusive."[5] At this point in the proceedings then, petitioner had not been afforded the right to present its position orally, and the only legal brief it submitted had not been considered, but was stricken.

These procedural defects, which were thrust upon petitioner, interfered with the exercise of constitutionally protected rights. When these defects are combined with the Supreme Court of Arizona's failure to review the original transcript of a proceeding held pursuant to its own order it is plain that petitioner was subjected to a meaningless appellate process. This

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[5] Petitioner admits that its memorandum was candid and forceful; denies that it was either disrespectful or abusive, and is of the opinion that if the submitted memorandum had been objectively considered, a rehearing would have been granted.

is contrary to the mandate of the United States Supreme Court that an appeal, once provided, must be meaningful. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

3. The Laws of the United States and the State of Arizona Are Contrary to the Arizona Supreme Court's Conclusion That the Size, Wealth, and Available Staff of the Petitioner Are Proper Considerations in Determining Whether It Exercised Due Diligence in Presenting the Newly Discovered Evidence Which Proved That Respondent Presented an Imposter at Trial; Moreover, Failure to Allow the Taking of Relevant Depositions Precluded Petitioner From Demonstrating Its Exercise of Due Diligence.

Wealth discrimination is not a fundamental right which requires a showing of a compelling state interest to sustain the classification. *San Antonio School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973). To sustain distinctions based upon wealth, however, a reasonable basis for the classification must exist and it must not be arbitrary in nature. *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Walters* v. *St. Louis,* 347 U.S. 231 (1954).

Corporations are persons within the ambit of protection of the equal protection and due process clauses. *Safeguard Mutual Ins. Co.* v. *Miller,* 472 F.2d 732 (3rd Cir. 1973). Consequently, any distinctions between the burdens placed on individuals and those on corporations, as it regards the exercise of due diligence in revealing newly discovered evidence, must have a reasonable and rational basis for its promulgation.

Petitioner is unable to discover authority to support the classification promulgated by the Supreme Court of Arizona. Moreover, neither the record of the trial court nor the opinion of the Supreme Court of Arizona states the basis for its conclusion that the

number of special agents, police officers and legal staff available to it is rationally related to the question of petitioner's exercise of due diligence.

Petitioner attempted to take the depositions of respondent's perjurer and the person producing him so that the court would have all the available evidence before it prior to determining the issue of due diligence.

The court prevented the taking of those depositions which would have demonstrated the impostor's extraordinary skill at deception. It thereby precluded consideration of evidence relevant to the issue of due diligence. This judicial prohibition severely curtailed petitioner's constitutional rights.

Any classification violative of the equal protection clause of the Constitution also violates the due process clause. *Johnson* v. *Robinson,* 415 U.S. 361 (1974). The classification which has been drawn here is arbitrary and lacks a valid state objective the absence of which violates this petitioner's constitutionally protected rights. *Turner* v. *Fouche,* 396 U.S. 346 (1970). The court's refusal to allow discovery relevant to the issue before it, produced an intolerable result.

4. Sustaining a Jury Verdict Predicated Upon Perjured Testimony Perverts the Jury System and Effectively Thrusts the Burden of Discovering the Authenticity of a Witness Upon the Adverse Party Thereby Depriving the Adverse Party of His Right to Jury Trial and Due Process of Law.

The Supreme Court of Arizona, in its supplemental opinion, affirmed the trial court's determination that the presence of perjured testimony was not of such

character that, upon retrial without the perjured testimony, a different result would occur.

The imperative question of upholding a jury verdict, which is premised to an unknown degree upon perjured testimony, was blandly disregarded by the trial court as evidenced by its statement that:

> "[c]asting aside the witness's testimony concerning his educational background and experience, his testimony was merely that of a typical accident reconstruction expert." (Report and Decision, p. 4.)

Arizona constitutionally provides for trial by jury in civil cases. Ariz. Const. Art. 2 § 23. The Supreme Court of Arizona's determination that perjured testimony, presented to and considered by the jury, is not basis for reasonably believing that a new result would occur upon retrial contravenes petitioner's right to a jury trial. Moreover, effectively shifting the burden of determining an expert's authenticity, from the party presenting him, to the adverse party is destructive of the adversary system and denies an opponent due process of law.

There are relatively few reported incidents of expert witnesses perjuring their testimony. *See* 38 A.L.R. 3rd 812. The majority of courts considering the question, in the context of a motion for new trial, and more specifically in determining whether a different result would occur upon retrial, have held that the jury verdict, albeit founded on perjured testimony, can be upheld. *See, e.g., Barton* v. *Plaisted,* 109 N.H. 428, 256 A.2d 642 (1969); *Freeman* v. *Jergins,* 125 Cal.App.2d 536, 271 P.2d 210 (1954). *But*

cf., Donati v. *Gualdoni,* 358 Mo. 667, 216 S.W.2d 519 (1949).

These decisions completely disregard the function of a jury in a civil case. The cornerstone of the jury system is the submission of disputed facts to the jury for final arbitration. *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U.S. 494 (1931). Traditionally, jurors are instructed, as they were here, that they are the sole judges of the credibility of witnesses and their truthfulness; indeed, the jurors are to determine the weight to be given to the testimony of any witness. *Batt* v. *State,* 28 Utah 2d 417, 503 P.2d 855 (1972). Jurors are bound to follow these instructions in rendering a verdict.

State courts have concluded that although a jury verdict is predicated upon perjured testimony, an esoteric determination can be made, by the judge as a thirteenth juror, that the perjured testimony was not relevant to the jury verdict; this conclusion patently violates a party's constitutional right to jury trial. The function of the jury is arbitrarily reduced to meaningless conduct.

The perjured expert witness must be perceived as the agent of the party presenting him. *Barton* v. *Plaisted,* 109 N.H. 428, 256 A.2d 642 (1969) (dissenting opinion). If he is not, then, the burden of vouching for the authenticity of a witness is shifted to the adverse party. Once this onus is transferred, the adversary system becomes suspect and the adverse party is denied due process.

Permitting a jury verdict to stand, although predicated upon perjured testimony, is wrong. There is no empirical method of calculating the effect of an in-

dividual witness's testimony on a jury verdict. This maxim is substantiated by the presumption that prejudice exists when improper evidence is admitted upon which the jury might act. *Mexia* v. *Oliver,* 148 U.S. 664 (1893). Furthermore, it must be assumed that the jury was influenced to the fullest extent by any evidence improperly admitted. *Valley Transp. System* v. *Reinartz,* 67 Ariz. 380, 197 P.2d 269 (1948); *Harris* v. *Thompson,* 18 Ariz. App. 154, 500 P.2d 1142 (1972).

In the instant case, an expert witness claimed the most respectable of professional pedigrees. His testimony, delivered in a beautifully cultured English accent, was directed to crucial issues in the controversy on which he was the only expert witness. Certainly, it cannot be contended with intellectual integrity that this perjurer's testimony had no affect upon the ultimate verdict.

The position of petitioner is succinctly stated by Justice Grimes of the New Hampshire Supreme Court in his dissenting opinion in *Barton* v. *Plaisted, supra,*

> "We are dealing here not only with what effect newly discovered evidence would have at a new trial but with the fact that the jury was permitted to hear and consider testimony from two hired witnesses on a 'significant issue' which has now been found to have been fraudulent.
>
> * * * *
>
> A rule which requires the Presiding Justice to forecast the workings of the minds of twelve suppositious jurymen can hardly be regarded as sensible."
>
> 256 A.2d at 649.
>
> Petitioner vigorously contends that "[p]lacing a burden upon a party prior to trial to discover

> the integrity of each witness presented by the adverse party, perverts the adversary system. Moreover, when this burden is either increased or decreased depending on the size and investigatory staff available to a party, it is tantamount to a denial of a party's constitutional right to due process and equal protection of law."
>
> (Objection to Finding, Judgment and Determination of Trial Court, p. 10.)

This same contention was properly placed before the Supreme Court of Arizona, which rather than address the issue, chose to ignore it.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

Respectfully submitted,

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BLEED THRO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CIV 1578
Pima County Superior Court
Cause No. 143887

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Delaware corporation,

Appellant,

v.

MELANIE LUECK in her individual capacity and as surviving widow of WILLIAM T. LUECK, deceased,

Appellee.

Petition for Review and Request for Oral Argument

COMES NOW MELANIE LUECK, Appellee, in the above entitled Court, and pursuant to Supreme Court Rule 47(b), does state that her motion for rehearing was denied by order dated the 24th day of September, 1974, and that herewith is filed a petition for review by the Arizona Supreme Court.

Appellee further requests, pursuant to Supreme Court Rules 4, 6 and 25, oral argument in the above entitled matter.

Dated this 8th day of October, 1974.

BARBER, HARALSON, GILES & MOORE
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703 Home Federal Tower
Tucson, Arizona 85701
Attorneys for Appellee

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

No. 11768-PR

(Filed April 25, 1975)

Southern Pacific Transportation Company,
a Delaware corporation,
Appellant,

v.

Melanie Lueck in her individual capacity and as surviving widow of William T. Lueck, deceased,
Appellee.

Appeal from the Superior Court of Pima County
Honorable Lloyd C. Helm, *Judge*
Remanded with Directions

Opinion of the Court of Appeals, Division Two,
—— Ariz.App.——, 523 P.2d 1327 (1974)
Vacated

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STRUCKMEYER, *Vice Chief Justice*

This is an appeal from a verdict of a jury and a judgment in an action for wrongful death at a railroad crossing. The jury in a unanimous verdict awarded $2,000,000, compensatory, and $1,080,000, punitive damages to Melanie Lueck, the surviving widow of William T. Lueck, deceased, and their two children, ages six years and 18 months. The Court of Appeals, —— Ariz.App. ——, 523 P.2d 1327 (1974), reversed, expressing the view that the evidence was not sufficient to submit to the jury the question as to whether the deceased's contributory negligence was barred by the defendant's wanton negligence. Decision of the Court of Appeals vacated.

We think it is first appropriate to review the law relevant to a determination of wanton and willful negligence in this case. Since Southern Pacific R. R. Co. v. Svendson, 13 Ariz. 111, 108 P. 262 (1910), wanton negligence has been a bar to the defense of contributory negligence. There, the court approved the statement:

> "The doctrine that contributory negligence will defeat recovery has no application where the injury is the result of the willful, wanton, reckless conduct of defendant." 13 Ariz. at 117, 108 P. at 264, 265.

The definition of wanton negligence as found in the Restatement of Law, Torts, was adopted in Arizona in 1945, Womack v. Preach, 63 Ariz. 390, 163 P.2d 280 (1945), and has been followed since. Conduct is wanton if a defendant intentionally does or fails to do an act, knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct not only created an unreasonable risk of harm to another but involved a high degree of probability that such harm would result.

The Restatement of Law, Second, although defining wanton negligence in terms of reckless conduct, appends this informative comment:

> "*a. Types of reckless conduct.* Recklessness may consist of either of two different types of conduct. In one

> the actor knows, or has reason to know, as that term is defined in § 12, of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would so so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it." (Comment *a* to § 500, at 587, 588.)

Willful misconduct means intentional, wrongful conduct, done either with knowledge that serious injury to another probably will result or with a wanton and reckless disregard of the possible results and is essentially a question of fact. Olea v. Southern Pacific Company, 77 Cal.Rptr. 332, 272 Cal.App.2d 261 (1969).

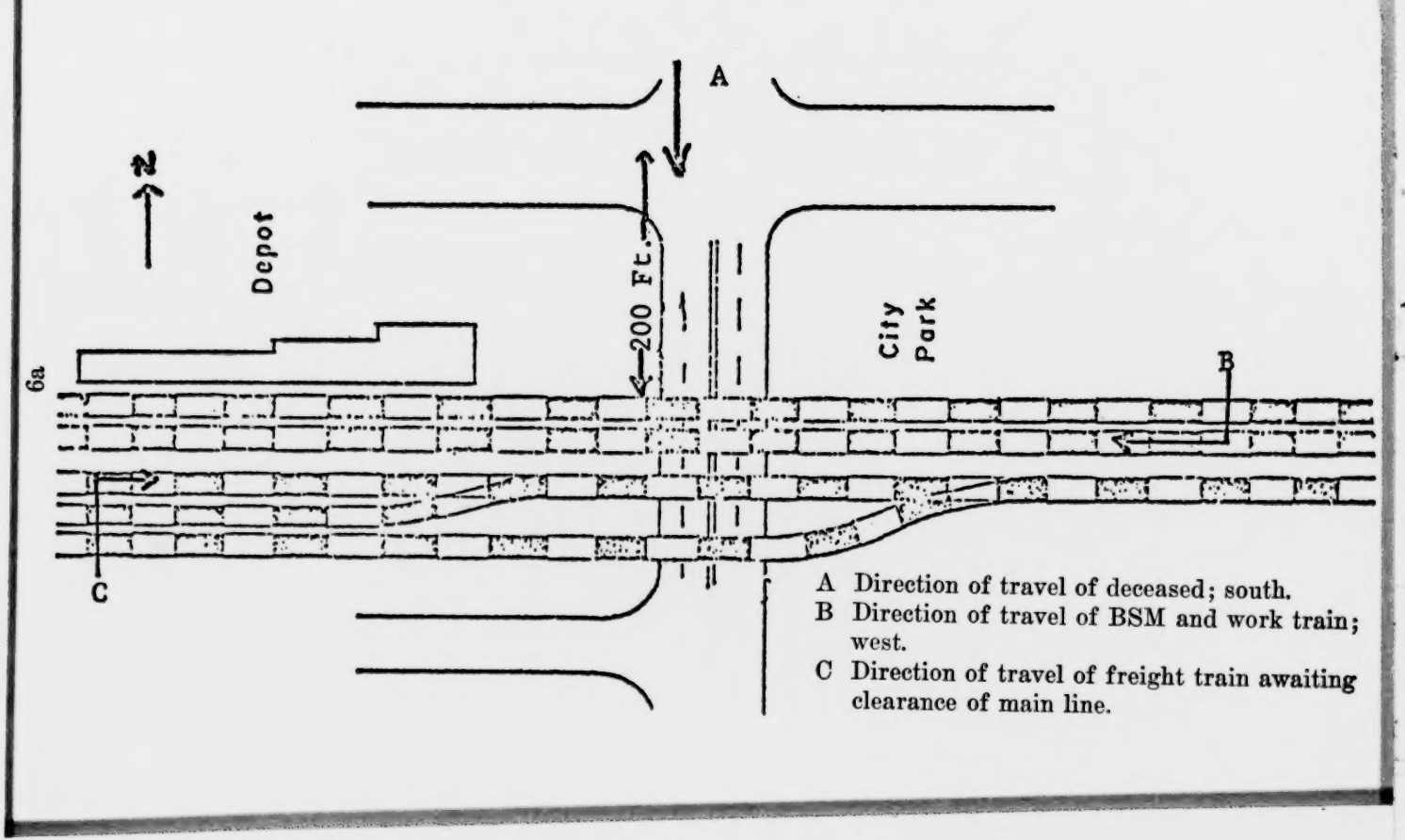
> "The usual meaning assigned to 'wilful,' 'wanton' or 'reckless,' according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." Prosser, Torts, 4th ed., § 34, p. 185.

To determine wanton negligence, the acts of a defendant must be considered as a whole and although each of several acts standing alone might not exceed the bounds of ordinary negligence, yet taken together they may establish wanton negligence. Carley v. Meinke, 181 Neb. 648, 150 N.W.2d 256 (1967). Where the evidence discloses several acts of negligence, whether gross or wanton negligence is established is a matter for the jury. Brown v. Riner (Wyo.), 500 P.2d 524 (1972).

At about 1:00 p.m. on November 29, 1966, on a clear day, William Lueck, a 30-year-old resident of Willcox, Arizona, was fatally injured when the truck he was driving was struck by a Southern Pacific Transportation Company train at the Maley Street crossing within the corporate limits of Willcox, Arizona. Shortly before the deceased's truck entered upon the railroad crossing, the Southern Pacific's Blue Streak Manifest passed over the Maley Street crossing on the main line traveling westward. The Blue Streak Manifest was followed one and one-half to two minutes later by a work train. This latter train struck the deceased's truck.

Maley Street is a four-lane, north-south, paved highway with cement curbs, two lanes for northbound and two for southbound traffic. Prior to the accident, deceased was driving his truck south on Maley Street loaded with 12 to 14 tons of sand and gravel at a speed of about five miles per hour. He was a resident of Willcox, familiar with the railroad crossing having used it almost daily. The crossing consisted of four tracks. It averaged a daily traffic count of 2700 to 3000 motor vehicles and an average of 32 trains in a 24-hour period. The decreased was struck on the main line, the second track from north to south. (See sketch adapted from defendant's Exhibit N.)

The railroad crossing where the accident occurred was protected by all the usual railroad crossing signs. In addition to the standard crossbucks, highway and pavement markings, there were four flashing red lights, eight inches in diameter with warning bells located at the sides of the crossing and two flashing red lights on an overhead cantilever extending over the center of the inside traffic lane with warning bells and a square sign warning "stop on red signal." At the time of the accident, since changed, the flashing lights and warning bells were activated by trains on the switching tracks.


A
N
Depot
200 Ft.
City
Park
B
6a
C
A Direction of travel of deceased; south.
B Direction of travel of BSM and work train; west.
C Direction of travel of freight train awaiting clearance of main line.

It is plaintiff's position that even if the warning bells and the flashing red lights had not momentarily stopped between the passage of the two trains, all the facts and circumstances then existing at the crossing tended to confuse and mislead the deceased. She points to 25 inferences which she derives from the evidence to support her claim of wanton negligence. We think, however, it is unnecessary to labor the issue to that extent. Taken in a light most favorable to upholding the jury's verdict, the facts hereinafter recited are more than sufficient to support a finding of both wanton and willful negligence.

The Evidence of Wanton and Willful Negligence By the Southern Pacific Transportation Company

Two hundred feet north of the point of impact is the intersection of a road parallel to the tracks, called Railroad Street, and Maley Street. From Railroad Street almost to the tracks the vision of an approaching motorist is obstructed both to the right and left as the crossing is approached from the north. On the left of a motorist is a city park in which trees obstruct the view to the east. On the right between Railroad Street and the tracks is a depot. The depot obstructs the view of a motorist looking toward the railroad siding and switching area on the right, to the west.

To the right at a distance of approximately one-fourth of a mile was a freight train at rest, waiting for the main line to clear.

The work train which struck the deceased consisted of an engine and caboose. The engine was running backward, pulling the caboose although it could have been turned at Bowie, a town approximately 24 miles to the east of Willcox. It was the conductor's responsibility and decision as to how the engine should be run. Because the engine was running in a backing position, the engineer had to rely on

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the fireman for information as to conditions on the north side of the railroad right of way.

The fireman saw the deceased's truck twenty seconds before the collision. He warned the engineer five times that he didn't think the deceased was going to stop, testifying:

> "Q. Sir, how many times between the time you first told him, Mr. Rhoades [the engineer], you didn't think he was going to stop, and the time you actually told him to big-hole it; how many other times did you indicate that you didn't think he was going to stop?
>
> A. To my knowledge, twice and maybe three times.
>
> Q. So you indicated to him two to three times in addition to the first one that you didn't think Bill was going to stop; is that correct, sir?
>
> A. To my knowledge, yes.
>
> Q. And then at approximately the fifth time, you said he is not going to stop, big-hole it?
>
> A. (Affirmative nod)
>
> Q. And he did; is that correct, sir?
>
> A. Yes, sir."

No effort was made by either the fireman, who also had emergency brake controls at the position where he sat, or the engineer to reduce the speed of the train until just before the impact. After striking the deceased's truck, the work train traveled between 2300 and 2500 feet before it came to a stop.

Because the engine of the work train was running backward, the oscillating white light on the front of the engine was pointing to the rear and was turned off. The oscillating light is a warning light designed to give a different and greater warning than the usual headlight. The single non-oscillating backing light at the rear of the engine was on.

The work train left Bowie going west from eight to ten minutes behind the Southern Pacific's Blue Streak Manifest which was traveling at the average speed of 60 miles

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per hour. At Willcox the work train had gained on the Blue Streak Manifest until it was between one and one-half to two minutes behind. The engineer is required by the Southern Pacific Company to proceed at maximum authorized speed, which was at the crossing 60 miles per hour. No allowance is made for lack of visibility.

A brakeman, who was sitting in the caboose, testified that the railroad's system of block lights was on yellow. When the block lights are on yellow, the railroad's safety rules require a train to proceed at a speed not in excess of 40 miles per hour. The accident report filed by the engineer the day of the accident showed that the work train was traveling at a speed of 52 miles per hour. The plaintiff's reconstruction expert testified that in his opinion, because of the distance required to bring the work train to a stop and other factors, it was traveling at a speed of up to 70 miles per hour. If the work train had been traveling at 40 miles per hour, according to the same expert, there would have been no collision.

Prior to 1965, a year before the accident, the speed limit for trains passing through the City of Willcox was fixed by the City Council at 30 miles per hour. Four years prior, the defendant railroad commenced negotiations with the City which culminated about a year before the accident with the Council raising the speed limit to 60 miles per hour *on assurances from the railroad of the safety of the crossing.* There had been four accidents at this crossing within the period from January 1963 to April 1966.

The jury could conclude from the foregoing stated facts that the Southern Pacific Transportation Company was negligent in at least these particulars:

1. Since the speed limit for trains was fixed at 60 miles per hour through the City of Willcox and since the work train was running at the estimated speed of as high as 70 miles per hour, it could have concluded that the work

train was being operated in violation of the speed law and that such constituted negligence per se.

2. Since by statute A.R.S. § 40-855 it is a criminal offense for an agent or servant of a railroad company to be guilty of any violation or omission of duty whereby human life or safety is endangered and by the company's rules, Rules 505, et seq., when an automatic block signal displays yellow a train must move at a speed not to exceed 40 miles per hour, the jury could conclude from the engineer's report alone that the work train was in violation of Arizona statute § 40-855 in that it was being operated in violation of law and that this constituted negligence per se.

3. Since by Rule 17-D of the company's rules and regulations the oscillating white light on an engine "* * * must be operated approaching road crossings at grade both day and night under all conditions" and the engine was running backward so that the oscillating white light was not visible to the front, and was, in fact, turned off, and the engine could have been turned at Bowie, the jury could believe that the failure to run the engine in the forward position endangered the lives of persons who might expect a through train moving on the main line at a high rate of speed to show the oscillating warning light. This violation of the company's safety rules is a violation of law and was negligence per se.

As to these three points, A.R.S. § 40-423 is applicable. Subsection A thereof provides:

> "If any public service corporation does or permits to be done anything forbidden or declared to be unlawful, or omits to do anything required to be done, by the constitution or laws of the state, or by orders of the commission, the corporation is liable to the persons affected thereby for all loss, damages or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may also award exemplary damages."

4. Since in traveling backward, the engineer had to look from the side window rather than through the front window and his view forward and to his right was impaired by the long end of the engine, the jury could conclude that this could result in the inability to control the train in an emergency and was a contributing cause to this accident. As the court said in Lester v. Atchison, Topeka and Santa Fe Railway Co., 275 F.2d 42, 45 (10th Cir. 1960):

> "If the jury should find that the choice of conduct of the train crew in running the train backward, knowing that the control and safety of the operation of the short and heavy train was thereby greatly impaired was wrongful to such an extent as to evince a reckless disregard for the rights of others, we believe a finding of gross negligence permissible under New Mexico law."

5. Since the fireman saw the deceased approaching the crossing approximately twenty seconds before the brakes were applied and told the engineer five times that he didn't think the deceased was going to stop, the jury could conclude wanton negligence from the deliberate maintenance of speed in disregard of observed danger. Western Constructors, Inc. v. Southern Pacific Company, 381 F.2d 573 (9th Cir. 1967).

Two further points should be made. They require enlargement on the facts related to this point.

6. Theodore H. Kruttschnitt, then Public Projects Engineer of Southern Pacific Company, testified concerning certain factors from which a conclusion could be drawn as to when a crossing is more than ordinarily dangerous:

> "Q. Would you consider the location, say, within a quarter mile area of known switching operations and sidings is a factor that should be considered?
> A. Yes * * *.

> Q. That kind of goes to the area of driver confusion or driver distraction, does it not, sir? The possibility that a driver may misinterpret signals as to whether or not another train is approaching on the main track or whether or not the signals may be activated by operations in a switching or siding area?
>
> A. Yes."

He also testified:

> "My experience as a commutor taught me that many of our very sad accidents were what I call the two-train type where a motorist will wait for a train coming in one direction which he sees and as soon as that train passes he starts up across the railroad in spite of the fact that the flashing lights are still working and gets hit by an unseen train going in the other direction on the other track."

The jury could conclude that Kruttschnitt's observation as to driver confusion were also true when one train follows closely behind another and that consequently the Maley Street crossing presented an unreasonable risk of bodily harm to others because of a high degree of probability that such harm would occur when the circumstances combined to confuse or mislead a motorist.

7. It is plaintiff's position that the Southern Pacific Transportation Company was in possession of information which would require that automatic gates be installed at the Maley Street crossing in order to adequately protect the public, but either through gross carelessness or deliberation the information was withheld from the City Council of Willcox at the time the defendant requested the Council to raise the speed limit from 30 to 60 miles per hour and, further, that this information was withheld from its division employees who were charged with the responsibility of evaluating the crossing and from the interested Arizona agencies.

The plaintiff's case of willful negligence is based upon these facts. Both Kruttschnitt, now Assistant to the Chief Engineer, and Frank Lathrop, Public Projects Engineer for Southern Pacific Company whose area covers California, Arizona and New Mexico, testified to a 24-year study done by the defendant company, completed in 1961 under the supervision of Kruttschnitt, which revealed among other things that crossings protected by flashing red lights, including cantilevers, have more incidents of accidents than those protected by the customary crossbucks and highway markings. It also showed that automatic crossing gates reduce fatal accidents over any other type of protective device, including a crossing watchman, by 90%.

Kruttschnitt also had knowledge of another study prepared by the California Public Utilities Commission which covered 168 crossings in California from the period of July 1, 1954 through July 30, 1964, conducted in basically the same manner as Kruttschnitt's study. The California Public Utilities Commission study concluded among other things:

> "Stated another way it appears that if automatic crossing gates had not been installed at these 113 points there would be approximately 52 more accidents, ten more deaths, and 25 more injured persons at this group of crossings in each calendar year as shown in Line 5 of Table 3.
>
> In other words if the gates installed during the ten-year test period were in operation during the entire ten years there would have been 271 fewer accidents, 50 fewer fatalities and 131 fewer injuries."

Neither the Kruttschnitt study nor the California Public Utilities Commission study was known to the employees of the Tucson Division of the Southern Pacific who were

charged with the responsibility of evaluating crossings and recommending safety devices.

R. O. Coltrin, Superintendent of the Tucson Division, charged with the ultimate evaluation of protective devices and recommendations for improvement, testified that he was not aware of the Kruttschnitt study.

Deryl B. Zumwalt, Division Engineer for the Tucson Division, delegated the evaluation and recommendation for improvement to Assistant Engineer Cornelius Sullivan. Zumwalt's testimony was contradictory. He testified in this case that he did know of the Kruttschnitt study, but was impeached by a showing that he had testified in a case in Maricopa County, Arizona in 1969 that he never heard of any such study. He did acknowledge that he had not personally seen a copy of the study.

Assistant Division Engineer Cornelius Sullivan had never seen the Kruttschnitt study until November 1969 and was not aware of its existence until that time. Sullivan also testified that if he had been aware of the conclusions of the study he probably would have recommended gates at the Maley Street crossing in 1963.

"Q. * * *

Sir, with the knowledge of that study and the comparison of fixed signs as compared to automatic signals and the fact that the study indicated you could expect more accidents and more combined injuries and fatalities at automatic signals than fixed signs would that have had any bearing on your recommendations to the City of Willcox from '63 through '66 if you had had that information made available to you?

A. It probably would have, yes.

Q. Thank you, sir. And what you are saying is, with that kind of information you probably would have recommended gates; right, sir?

A. Yes."

Other interested persons were never informed of the Kruttschnitt study. William J. Whisnant, Director of the Tariff and Rate Division of the Arizona Corporation Commission, testified that he had never been or heard of the Kruttschnitt study. So far as he was aware it had never been furnished to the Corporation Commission. Edward P. Brown, Supervisor of the Utility Railroad Engineering Division of the Arizona Highway Commission, testified that he had never seen a study of the Southern Pacific Company concerning the effectiveness of grade crossing warning devices.

Kenneth P. Hamblin, an employee of the Arizona Highway Department since 1959, who had been Supervisor of the Traffic Study Section for three years and a field study supervisor for an additional three years, testified to a study he had made of the Maley Street crossing in May of 1966, six months before decedent's death, at the request of the City Manager of Willcox. He concluded that there should be crossing gates installed at Maley Street, testifying:

> "It is a combination of conditions that existed at that time: One being that it was an urban crossing, a multi-lane highway, the daily vehicle count and a limited view of approaching trains; the fact that there were four tracks, switching operations, thirty-two trains daily, sixty mile per hour trains and the accident experience that had been there in the last couple of years, the couple of years prior to the study."

That the Arizona Highway Department was studying the Maley Street crossing was conveyed to the Southern Pacific Company at least as early as April 19, 1966. This conclusion was reported to the City Manager of Willcox in July of 1966.

Lathrop listed the factors to be considered in determining whether gates should be installed at crossings. They were:

1. Motor vehicle speed.

2. Visibility of the motor vehicle driver as he approaches the crossing.

3. Visibility of the train crew.

4. Parallel streets relatively close to the crossing.

5. Intersections near the crossing.

6. Speed of trains.

7. Switching activity in the vicinity of the crossing which periodically activates the signals at the crossing.

8. Number of trains per day.

9. The motor vehicle traffic count.

10. The accident history of the crossing.

11. The grade of approach.

Lathrop's testimony on cross-examination was to the effect that all these factors were present at the Maley Street crossing except the grade approach. He also was examined extensively on his recommendation that gates be installed at certain California crossings based on the existence of some, but not all, of the hazardous factors which he listed as existing at the Maley Street crossing.

Kruttschnitt listed three additional factors which should be taken into consideration:

1. Weather conditions.

2. Width of the highway; whether it was of two, four or six lanes, and

3. Whether the crossing was a single or multi-track crossing.

Prince Pierson, City Manager of the City of Willcox at the time of the collision, testified that the City Council would have followed the recommendations of the Southern

Pacific Company with regard to safety and would have directed the installation of gates at any time that the Southern Pacific had recommended it. He also testified that he was never told of the Kruttschnitt study, but had he known of the conclusions of the study he would have recommended the installation of gates to the City Council.

The Plaintiff submitted certain interrogatories to the Southern Pacific Transportation Company which included in part the following questions:

> "Are you aware of any studies, statistics, or research projects which have been performed by you or other organizations concerning the effectiveness, or lack thereof, of crossing gates in reducing crossing accidents and/or injuries?"

Thereafter, when plaintiff felt that the answer was not responsive to the question, she re-submitted the same interrogatory, which the attorneys for the Southern Pacific Transportation Company, under oath, answered, "No".

From the foregoing, the jury could conclude that the Southern Pacific Transportation Company was either willfully or wantonly negligent in failing to inform its agents and employees in its Arizona Division or other interested persons in Arizona of facts which, at the same time of increasing the speed limit in 1965 from 30 to 60 miles per hour through the City of Willcox, would have required the installation of automatic crossing gates at Maley Street to ensure the safety of the public.

Damages

This brings us to the questions raised by appellant as to the claimed excessiveness of the damages awarded by the jury. In our most recent case on punitive damages, where actual damages of $3,600 actual damages and $15,000 exemplary or punitive damages was awarded, we said:

> " 'Punitive damages are allowed on grounds of public policy, Downs v. Sulphur Springs Valley Electric Coop., 80 Ariz. 286, 297 P.2d 339 (1956), and are based on aggravated, wanton, reckless or maliciously intentional wrongdoing. Lufty v. Roper, 57 Ariz. 495, 115 P.2d 161 (1941). Such damages are not to be awarded to compensate a plaintiff for the loss sustained, but, rather, are awarded for the avowed purpose of punishing the wrongdoer for his intentional misconduct and they also act as a deterrent to further wrongdoing. Nielson v. Flashberg, supra; Restatement of the Law, Torts, § 908 Comment a." Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971)

and we also said;

> "In Arizona, the law is well settled that the amount of an award for damages is a question peculiarly within the province of the jury and such award will not be disturbed on appeal except for the most cogent of reasons, i.e., the verdict is so exorbitant as to indicate passion, prejudice, mistake or a complete disregard of the evidence and instructions of the court. Meyer v. Ricklick, 99 Ariz. 355, 409 P.2d 280 (1965); City of Yuma v. Evans, 85 Ariz. 229, 336 P.2d 135 (1959). We have in the past, held that punitive damages will be upheld unless the verdict is 'so manifestly unfair, unreasonable and outrageous as to shock the conscience of the Court.' Young Candy & Tobacco Company v. Montoya, 91 Ariz. 363, at 370, 372 P.2d 703 at 707 (1962)." 107 Ariz. at 579, 490 P.2d at 835.

The purpose of punitive damages is to punish a wrongdoer for his wrongdoing. The wealth or financial status of the wrongdoer is therefore relevant and may be known to the jury so that it may impose an appropriate punishment. Acheson v. Shafter, supra; Nielson v. Flashberg, 101 Ariz. 335, 419 P.2d 514 (1966). As to this, the plaintiff's evidence

established that the net assets of defendant were $1,712,-727,000 for the year 1972 and that its annual income after expenses but before income taxes was $165,555,000.

Applying the foregoing to the evidence in this case, it is apparent that if the jury concluded that the Southern Pacific Transportation Company had either deliberately or through wanton or gross negligence withheld from its employees facts which would have required and resulted in the upgrading of the Maley Street crossing by the installation of crossing gates, the punitive damages awarded were not so manifestly unfair, unreasonable and outrageous as to shock the conscience.

In examining defendant's argument that the award of actual damages by the jury is excessive, we consider that the decision of the United States Supreme Court in Grunenthal v. Long Island Railroad Company, 393 U.S. 156, 89 S.Ct 331, 21 L.Ed.2d 309 (1968), has particular significance. There, a jury in the Southern District of New York awarded actual damages in the sum of $305,000. On appeal, the Second Circuit ordered a remittitur of $105,000. The Supreme Court observed that the discussion by the Court of Appeals concerning the amount of damages was limited to the bald statement that it could not in any rational manner consistent with the evidence arrive at a sum greater than $200,000. The Supreme Court in reinstating the jury's verdict held that if damages are ordered reduced by an appellate court an appraisal of the evidence must be made which discloses the excessive nature thereof.

The defendant does not attempt to evaluate the evidence other than pointing to the deceased's income tax return, which showed that in the five years preceding his death he had taxable income in his best year of $5,834.37, and an assumed economic loss to plaintiff of $691,769 reduced to present value of $281,863. Defendant argues that $281,863 would not provide a basis for a two million dollars compensatory award. The figure of $281,863 is taken from the

testimony of Edward Heller, by profession an economist with a specialty in the field of manpower economy, resource economics. He testified that there were studies available as to future earning capacity of an individual as it relates to inflation and the purchasing power of the dollar, and that by means of these he was able to project what a person of a given education and training could reasonably earn in the future.

Heller made a study or evaluation of the earning capacity of deceased. In arriving at his conclusions, among the factors considered were that the deceased was a high school graduate with vocational training in welding and had operated a welding shop from his high school days until 1961 when he started the business known as Lueck's Construction Materials. He testified:

> "A. * * * In terms of surveying the job market, Mr. Lueck, as a—what we would call a heavy-duty welder, heavy-duty concrete—I can't now remember the exact title now, but it's a—concrete journeyman; a person who could pour, finish, do the molding work necessary with heavy concrete construction—could have expected to earn around the same $800 per month at the—in 1966.
>
> Q. Would I be correct, then, the fringe benefits, plus the 800 a month, are the figures you used to make your ultimate conclusion?
>
> A. Yes. Plus the cost of replacing his services, less his personal consumption.
>
> Q. * * * What I was driving at, if Mr. Lueck had been in the job market, rather than in a self-employed situation, would the additional fringe benefits he would expect to have mean that he would have had a greater earning capacity in a job market, as opposed to being self-employed?
>
> A. Very definitely.

Q. And yet you used the lesser end of those two figures?
A. Yes."

It is therefore apparent that the deceased's earning capacity over his life expectancy of 41 years was predicated on the assumption that Lueck could be employed as an expert welder or journeyman concrete worker.

The jury was not, however, compelled to accept as conclusive the statistical approach used by Heller. Other evidence disclosed that deceased was a well-liked, industrious, hard-working male of the age of 30 years, that the business of Lueck's Construction Materials involved manufacturing and selling ready-mixed concrete for buildings and irrigation ditches; that in addition deceased operated a gravel pit and sold gravel; that in the course of the five years since he started the business, he had acquired by the time of his death three mixers, three dump trucks, three loaders, a rock crusher, a steam shovel and blade, and a batching plant.

The Iowa Court in Nicoll v. Swett, 163 Iowa 683, 144 N.W. 615 (1913) has probably best summarized the difficulties in the assessment of damages for wrongful death:

> "It is correct to say, as does the appellant, that the only true measure of recovery for the death of an individual is the value of his life to his estate, had he not come to such untimely end. It is hardly too much to say that this rule is vague, uncertain, and speculative, if not conjectural, but it is the best which judicial wisdom and experience has yet been able to formulate. No evidence is possible of the time which deceased would have lived but for the injury complained of. Had he avoided this injury, death may have met him the next day, week, or year in some other form. In business he might have become a phenomenal success and accumulated millions, or he might have lived to old age and

died a pauper. From a man of good habits and prudence and industry, he might have become a spendthrift or a tramp, or if a man of dissolute habits he might have reformed into an efficient and prosperous citizen. But the demands of justice will not tolerate the idea that human life may be extinguished by the tort of another without the wrongdoer being held to answer therefor in damages, and the rule we have stated is the one which has been devised for this purpose. The principle which underlies it is of unquestionable soundness, but the difficulty which besets its practical application is in the fact that it calls for an estimate or conclusion which must be arrived at by a balancing of mere probabilities and possibilities which we deduce by way of inference from the age, character, habits, condition, education, employment, surroundings, and apparent capacity of the deceased. Fairness to the beneficiaries of the estate on the one hand and of the defendant on the other require that the jury be put in possession of all the facts having the slightest legitimate bearing upon this intricate problem." 163 Iowa at 687-688, 144 N.W. 615 at 617.

Plaintiff points to the recent Florida case of Compania Dominicana dé Aviacion v. Knapp, 251 So.2d 18 (1971), in which a verdict for $1,800,000 was upheld in favor of a father and mother for the wrongful death of their 15-year-old son. The son was a graduate of a junior high school about to enter high school, a good student, friendly, polite, warm, active, religious, and at the time of his death was working in his father's paint and body shop. There was also testimony as to the grief and anguish of the parents. The Florida court noted that the amount of the verdict was determined by a carefully chosen jury after a lengthy trial before an experienced and knowledgeable judge with the assistance of expert counsel. It said in concluding that the verdict and judgment were supported in law and fact: "No

one doubts that the verdict is large. No one doubts the enduring pain which the parents have suffered."

While it is true the deceased's net earnings for taxes were relatively small, we think it can be said that the jury could make its own evaluation of the earning capacity of the deceased over his lifetime from the establishment of a successful, going business at the age of thirty, which evaluation would be much greater than the purely statistical approach used by Heller.

The jury could consider other matters for which the members of deceased's family should be compensated: For the wife, her loss of love, affection, companionship, consortium, and her personal anguish, sorrow, suffering and pain and shock which resulted from her husband's death. For the six-year-old son, it was shown that following the accident he commenced to draw pictures of train wrecks, that he refused to go to school and developed head and stomach aches and that these problems were determined to have been caused by the emotional loss of his father, and that it was three years before he overcame them. For the 18-month-old child, it was shown that after the accident he would not leave the presence of his mother even to be held by his grandparents and if his mother left he would scream until she returned, and he refused to sleep in his own bed until some six months after the death of his father. The jury could also consider what the sons were to be compensated for the loss of love, affection, comfort, guidance and companionship which they would have received from their father.

The defendant has not questioned the instructions on the elements of damages which were submitted by the trial court to the jury and no interrogatories or separate forms of verdicts were requested from the jury segregating the damages suffered by each survivor. There is accordingly now no way of determining what the jury believed the plaintiffs individually suffered. We are not convinced the

verdict is so outrageously excessive that it compels the conclusion that it must have been based on passion and prejudice.

OTHER ASSERTED ERRORS

The defendant urged that the instructions on wanton negligence were erroneous and prejudicial and points to plaintiff's instructions 8, 26(a) and 34. In those instructions, the terms gross negligence, wanton negligence, and willful misconduct are used. It is argued that the jury could thereby infer that there were three separate categories of negligence under which a verdict could be returned against the defendant.

An examination of the objections to plaintiff's instructions 8, 26(a) and 34 reveals that no objection was made on this basis. Rule 51(a), Rules of Civil Procedure, 16 A.R.S., reads in its pertinent part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972), the court commented on Rule 51(a) to this effect:

> "The purpose of Rule 51(a), supra, is to apprise both the trial court and the party offering the instruction of the exact nature of the objection so that the court can intelligently rule thereon, eliminate objectionable matter, and word the instruction in a manner which might be agreeable to all parties." 18 Ariz. App. at 91, 500 P.2d at 351.

Defendant urges that the court erred in failing to give its requested instruction No. 6. Defendant's requested No. 6 was to the effect that an engineer or other employee in

charge of a train has in the exercise of ordinary care the right to presume that the vehicle a person is riding in over a crossing is under control and in good repair. While as an abstract proposition the instruction was correct, it was properly refused because it suggested to the jury that there was an issue whether deceased was in control of his truck and whether it was in good repair. There was no evidence that deceased did not have his truck under control or that it was not in good repair. Hence, there was no issue to be resolved by the use of a presumption.

Defendant's requested instruction No. 12 is afflicted with the same vice.

The defendant urges that the trial court erred in refusing to give its requested instruction No. 7(b). The requested instruction reads:

> "If you find the plaintiff's contributory negligence was gross or wanton, then the plaintiff may not recover, regardless of whether the defendant was grossly negligent."

While the Arizona courts have never ruled on the abstract proposition that gross or wanton contributory negligence on the part of a plaintiff is a defense to gross or wanton contributory negligence on the part of the defendant, we have many times held that where there are no Arizona decisions clearly on point we will follow the Restatement of Law, Torts.

The Restatement of Law, Torts, published in 1939, did not recognize the doctrine; however, the Restatement of Law, Second published in 1965, by § 503 has adopted the principle as governing. Section 503 provides:

> "(1) A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety.
>
> • • •

> (3) A plaintiff whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of the plaintiff's safety is a legal cause of the plaintiff's harm."

Comment *c* thereto reads:

> "In general, the effect of the plaintiff's reckless disregard of his own safety is the same as that of his ordinary contributory negligence. The exception to this rule, stated in Subsection (3), is that where the plaintiff's conduct is itself in reckless disregard of his own safety, it bars his recovery not only from a defendant who has merely been negligent, but also from one who has acted in reckless disregard of the plaintiff's safety. The greater fault in the one case is balanced against the greater fault in the other."

We have concluded, consistent with our former decisions, and we hold, that a plaintiff's wanton contributory negligence may be balanced against the wanton negligence of a defendant so as to bar a recovery in Arizona. We are of the opinion that as an abstract proposition a jury could find that a person who drives upon a railroad crossing against the flashing red lights was grossly or wantonly negligent.

However, the defendant's proffered instruction is plainly deficient. First, it assumes that the plaintiff was not contributorily negligent. Second, it fails to advise the jury that this asserted gross or wanton contributory negligence must be the proximate cause of the accident and injuries which the deceased suffered; and, third, by wording "the plaintiff may not recover regardless" it strongly tends to suggest that the jury must not return a verdict in favor of the plaintiff. This is contrary to our express holdings in Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 170 (1970) and Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444 (1962).

In view of our conclusion that the instruction was fatally deficient, we do not feel called upon to pass upon the plaintiff's argument that A.R.S. § 40-423, quoted supra, imposes strict liability upon a public service corporation where it willfully omits to do an act required by the laws of this State. See, e.g., McCallie v. N. Y. Central Rd., 23 Ohio App. 2d. 152, 261 N.E.2d 179 (1969).

The defendant complains of the order of the Superior Court changing the venue of the trial action from Cochise County to Pima County.

By A.R.S. § 12-406(A), if either party to a civil action pending in the Superior Court files an affidavit alleging any of the grounds specified in subsection (B), the venue may be changed to the most convenient adjoining county. Section (B) of § 12-406 provides as one of the grounds:

> "That the convenience of witnesses and the ends of justice would be promoted by the change."

The plaintiff filed an affidavit which set forth that the plaintiff and her two minor children now resided in Tucson, Pima County, Arizona; that counsel for both plaintiff and defendant resided in Tucson; that the personnel of defendant and members of the train crew and employee witnesses of the Tucson division of the defendant were all residents of Tucson; that facilities, both court and motel, were better in Tucson than in Bisbee; and that the employees of the defendant could obtain direct flight connections from Los Angeles and San Francisco to Tucson.

Defendant in its unverified opposition to the motion for change of venue urged:

1. That the plaintiff's motion was untimely;
2. That many of its witnesses resided in Cochise County;

3. That facilities and other accommodations in the Bisbee area were adequate; and

4. That the residents of the City of Willcox, from which several of their witnesses were expected to come "would be safer if they were not exposed to the hazards of freeway driving and the metropolitan traffic of the City of Tucson."

Defendant argues in this Court that the prejudice to the defendant is obvious in three particulars:

"1. The Defendant has been effectively deprived of its right to file a request for change of judge; and then

2. It was forced to try the case in a county in which it had consistently received the most venomous publicity from the newspapers and television stations; and

3. Cochise County jurors, familiar with the crossing, would have realized Mr. Lueck's negligence."

It is not obvious to the members of this Court that the defendant was effectively deprived of the right to request a change of judge, or that it was forced to try the case in a county in which it had consistently received the most publicity and that Cochise County jurors would have been so familiar with the crossing as to have realized deceased's negligence. Nor do we think the court abused its discretion in light of the fact that the cost of the trial to the litigants would be substantially reduced.

We now come to the final matter requiring our consideration.

On February 18, 1975, defendant filed in this Court a motion to supplement the record. The motion was based on "newly discovered, relevant evidence" as set forth in at-

tached affidavits and was filed assertedly pursuant to the authority of Rule 75(h) of the Rules of Civil Procedure, 16 A.R.S.

We have previously expressly held under language the same as Rule 75(h), *see* § 21-1826, A.C.A. 1939, that the rule does not authorize the supplementation of the record with evidence which might have been relevant to the issues tried in the court below. Hughes v. Young, 58 Ariz. 349, 120 P.2d 396 (1941).

Hughes v. Young follows the general rule of wide application that an appellate court can determine a cause only upon the record of the court below. We said, for example, in Potter v. Home Owners' Loan Corporation, 50 Ariz. 285, 72 P.2d 429 (1937):

> "Counsel for both plaintiff and defendant have in their briefs, made many statements as to what did happen, and what would have happened if the situation had been different. We, of course, cannot consider such statements, being confined in our determination of the case to what is shown by the record and the necessary and reasonable inference to be drawn therefrom only." 50 Ariz. at 289, 72 P.2d at 431.

The Arizona Supreme Court has original jurisdiction in certain common law writs, Article 6, § 5, Constitution of Arizona. This case, however, invokes our appellate jurisdiction. A motion for new trial filed in this Court is not addressed to our appellate jurisdiction. Its consideration does not call for review of any judgment or order of the trial court. It is in the nature of an original proceeding which this Court does not have the power to entertain. Rodriguez v. Williams, 104 Ariz. 280, 451 P.2d 609 (1969); Yerger v. Bross, 68 Ariz. 104, 201 P.2d 121 (1948). Nor will we remand a case for a new trial based upon newly discovered evidence, since such a motion is not properly

addressed to this Court. State v. Davis, 104 Ariz. 142, 449 P.2d 607 (1969).

Indeed, it has been held under a similar constitutional provision to Arizona's that even the Legislature cannot authorize the Supreme Court to receive evidence since it contravenes the constitutional provision that the Court has appellate jurisdiction.

> "After Schmidt v. Equitable Life Assurance Society, 376 Ill. 183, 33 N.E.2d 485, 136 A.L.R. 1036, had been docketed in this court, one of the parties undertook to supply evidence to correct a material defect in the record by the introduction of affidavits on motion. It was held that subparagraph (d) [Sec. 92 of the Illinois Civil Practice Act], insofar as it undertook to authorize the introduction of evidence in a court of review that had not been made a part of the record when the cause was pending in the trial court, was unconstitutional. If the affidavits should be assuming original jurisdiction in reference to such affidavits, and act which the constitution forbids in this kind of case." Atkins v. Atkins, 393 Ill. 202, 206, 65 N.E.2d 801, 803 (1946).

By the Constitution of Arizona, Article 6, § 14, the Superior Court has original jurisdiction of cases and proceedings not vested by law in another court.

The facts presented by the defendant's affidavit and the plaintiff's objection to consideration of the matters contained therein illustrate the practical problem inherent in an appellate court's consideration of matters extraneous to the record.

It is deposed by the attorneys for the Southern Pacific Transportation Company that the plaintiff's reconstruction expert, A. W. Dickinson, did not hold B.A. and M.A. degrees from Cambridge University in England and that

he had not worked for certain companies in the United States or held certain positions, as, for example, a member of the von Braun aerospace team, as he testified. The plaintiff in her objection to the supplementation of the record asserts that due diligence on the part of the defendant would have disclosed the matters contained in its motion prior to the trial of this case in August of 1973, that defendant did not choose to contradict his testimony by other experts nor is it now contended that his opinions and conclusions are false.

Plaintiff submits a letter from one Vaughn P. Adams, a consulting engineer and Assistant Professor of Industrial Design at Arizona State University, to the effect that he has reviewed the testimony of A. W. Dickinson and is of the opinion that the methods employed by Dickinson to determine the velocity of the locomotive and caboose were correct and that there was no significant error either in the methods used or the arithmetic results.

By Article 6, § 5, subsec. 5., Constitution of Arizona, this Court is empowered to "make rules relative to all procedural matters in any court." Since it is palpably impossible for the members of this Court to determine whether the asserted perjury was such as to probably affect the outcome upon a retrial, *see* A.L.R.3d 812, Anno: Perjury or Willfully False Testimony of Expert Witness as Basis for New Trial on Grounds of Newly Discovered Evidence, we have decided to treat defendant's motion as a timely motion for a new trial under Rule 60(c), Rules of Civil Procedure, 16 A.R.S.

We direct that this matter be remanded to the Superior Court of Cochise County and the Honorable Lloyd Helm, trial judge thereof, who, having had the opportunity to see and hear the witness, has the necessary feel for the case.

The Superior Court shall determine, pursuant to Rule 60(c), whether the asserted newly discovered evidence could

not have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., and whether it is of such a character as to give reasonable assurance that it will work a different result upon retrial.

Upon the determination thereof, in order to obviate the necessity of another appeal, the Superior Court shall advise this Court of its ruling. Either party will thereafter have ten days within which to file objections in this Court and the opposing party will have ten days within which to respond. Whereupon this Court will either affirm the judgment or reverse with an order directing a new trial, as it deems fit in the premise.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

CONCURRING:

JAMES DUKE CAMERON, *Chief Justice*
LORNA E. LOCKWOOD, *Justice*
JACK D. H. HAYS, *Justice*
WILLIAM A. HOLOHAN, *Justice*

No. 11768-PR

Motion for Rehearing

(Caption Omitted in Printing)

Introduction

How Did It Happen That the Court Failed to Point Out In Its Opinion That the Jury Returned a Verdict in Favor of the Engineer and the Fireman and Against the Plaintiff?

It is startling that this very important circumstance is totally omitted from the Court's Opinion. When this astounding oversight is corrected by inclusion of the important fact that the jury completely vindicated the Engineer and the Fireman who operated the train thus exculpating their employer of negligence in the operation of the train across the crossing, there only remains for consideration the true gist of the case which was dealt with by the Court of Appeals as follows:

> "We are unable to agree with appellee's contention that the failure to install 'the ultimate' in crossing safety devices in this case constitutes gross or wanton or wilful misconduct."

The many serious omissions and distortions of the record require that a rehearing with oral argument must be granted in this case.

I.

Alleged Evidence of the Wanton and Wilful Negligence of the Defendant Southern Pacific Transportation Company.

After oral argument on appeal, the Court of Appeals upon consideration of the Briefs and records, concluded

that the defendant Railroad was not guilty of wanton negligence. This Court, without hearing oral argument and perhaps because of the lack of that assistance, relies heavily and discusses in detail five separate circumstances involving the operation of the train from which the jury could conclude that negligence existed.

Contrary to the implication created by the Opinion, the jury did not conclude that negligence existed in the operation of the train. On the contrary, it vindicated the Engineer and the Fireman by its verdict in their favor and it is the duty of the Court to take the facts in the light most favorable to uphold this jury verdict to the same extent that it would employ the same principle to uphold the verdict against the Railroad.

After omitting any reference to the jury verdict for the Engineer and the Fireman, the Court mistakenly states that the view of the approaching motorist is obstructed both to the right and to the left as the crossing is approached from the north. While the station, located to the right of the driver, obstructs his view in that direction, there was no obstruction to the driver's left. It was in this quadrant that the train approached the crossing. While there are some trees in the park, the photographs in evidence show beyond any question that there was an open and adequate view for the driver of the truck in question had he looked, to have seen the train approaching. [Def. Exh. C-9, 12, 13] An eye witness who had to look through the whole park had no trouble in seeing the approaching train. [10 TR 178, 182]

The Court's holding that there was sufficient evidence of gross negligence was based upon seven specific areas.

1. *Violation of City Speed Limit.*

As set forth in the many Affidavits on file herein, this testimony was based solely upon the perjured testimony of

Mr. Allan William Dickinson. The Court unconditionally adopted his testimony, saying:

> "The plaintiff's reconstruction expert testified that in his opinion because of the distance required to bring the work train to a stop and other factors, it was traveling at a speed up to 70 MPH. If the work train had been traveling at 40 MPH according to the same expert, there would have been no collision."

It is beyond belief that a court would allow a Three Million Eighty Thousand Dollar verdict to be affirmed upon the testimony of such an accomplished perjurer, who is now awaiting trial for identical perjury in a California case against the Southern Pacific. [See Appendix]

Furthermore, both the Engineer and the Fireman testified to speeds well within the speed limit established by the City of Willcox and a jury verdict was rendered in their favor. [4 TR 54, 59; 5 TR 13]

2. *Speed Restriction by Virtue of Yellow Signal.*

This testimony came from one brakeman who was seated in the caboose and said the signal was yellow; however, the Engineer, in whose favor the verdict was rendered, specifically testified that the signal was green. [4 TR 54] If the Court takes this testimony in the light most favorable to upholding the jury verdict in favor of the Engineer, there could not have been a violation of the Company rule.

3. *Alleged Violation of Rule 17(D) of the Company's Rules of Procedure.*

Here, again, is another incredible distortion of the record by the Opinion writer. Rule 17(D) reads as follows:

> "Oscillating white light *on engine so equipped* must be operated during stormy weather day and night, foggy weather during daylight hours only and must be

operated approaching road crossings at grade both day and night under all conditions." (emphasis supplied)

The Opinion left out the specific statement "on engine so equipped." Not all engines are equipped with white oscillating lights on both ends even though the engines were designed to run both frontwards and backwards. It is not a violation of this Rule for the engine to be operated in reverse.

Furthermore, even if the failure to turn the lights on when it was faced away from the crossing were deemed by someone unfamiliar with railroad operation to be a violation of the Rule, it could not under any circumstances have been a proximate cause of the accident in question.

To claim that an alleged violation of a Southern Pacific work rule constitutes a criminal law violation (A.R.S. § 40-855) raises a serious constitutional question which is covered in Paragraph V hereof.[1]

4. *Engineer's Alleged Inability to Control Train.*

These allegations of negligence made against the Engineer in his operation of the train because the train was running in the backwards position were made to the jury and the jury did not buy them—they rendered a verdict in favor of the Engineer. They do not form a valid basis for negligence against the defendant Southern Pacific.

Furthermore, the Court's citation of *Lester* v. *Atchinson, Topeka & Santa Fe Ry. Co.*, 275 F.2d 42 (10th Cir. 1960)

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[1] A.R.S. § 40-423 is not even applicable as it refers to "unlawful" conduct or failure to meet requirements of:

". . . the constitution or laws of the state, or orders of the commission. . . ."

Rule 17(D) does not fall within any of these categories. This section has been held by the Court to merely reaffirm common law rules of liability and not create any additional rights.
Cole v. *Arizona Edison Co.*, 53 Ariz. 141, 86 P.2d 946 (1939)

which strongly implied a similarity of fact situations, was misleading at best. In the *Lester* case:

> "The train consisted of a caboose, seven heavily loaded cars and an engine and was traveling cross country with the caboose as the lead car, followed by the seven freights and pushed by an engine." (p.44)

The train in question was not a "short and heavy" train, the operation of which was "impaired" as in the Federal case and it is improper to compare them. The only comparison is that they were both backing and this segment of the Opinion, if it is not changed, will be cited henceforth to establish that any backing movement is grounds for claiming wilful and wanton negligence.

5. *Alleged Deliberate Maintenance of Speed and Disregard of Observed Danger.*

The Fireman was quite confused in his testimony, which is not unusual, and the times and stopping attempts as testified to by him are inconsistent. [5 TR 55-68] Notwithstanding the inconsistencies, the jury returned a verdict in his favor. If the jury found against the plaintiff and for the Engineer and the Fireman, how can this Court in good conscience say their acts or omissions constitute the basis for finding their employer guilty of negligence, much less gross negligence?

6. *Alleged Confusion Resulting From One Train Following Another.*

The Court has taken certain testimony out of context and attempted to apply it to a situation substantially different from that which the witness was testifying about. The trap situation that existed on the peninsula between San Jose and San Francisco was not in any way similar to Maley Street in Willcox, Arizona. The evidence, without contradiction, showed the California crossings involved

two mainlines where a train going south would activate signals, an automobile would stop, and as the train cleared, even with the signals not stopping, the auto would suddenly pull forward into the path of a train which was going north on the other tracks.

That trap situation differed substantially from Maley Street where:

1) The trains in question were both going the same direction;

2) The car of the decedent never stopped and then pulled out;

3) There was not a continuous ringing of the bells and flashing of signals.

The only witness to testify about the starting of the signals definitely stated that he heard the bells come on: [10 TR 177]

> "Q: Did you have occasion to notice whether or not there were any kinds of signals or bells at Maley Street and the Southern Pacific track that warned oncoming motorists that a train is coming?
>
> A: Well, I heard the bell come on. . . ."

Even assuming the facts most favorable to the plaintiff, the train preceding the one in question was at least a minute and a half to two minutes in advance which would have meant the signals would have been off for a little over a minute to a minute and a half prior to commencing again. [8 TR 148]

Plaintiff's own witness after all forms of leading questions were put to him still maintained: [2 TR 190]

> "Q: (By Mr. Haralson) Maybe my question wasn't clear. Have you ever seen, during and around that

time, situations where the lights might be flashing, without there being any trains visible?

A: Only when they were working on the lights."

These facts do not provide a basis for a finding that there was an unreasonable risk of bodily harm because of the high degree of probability of some motorist being confused. All the motorist in question had to do was obey the signals by stopping his truck when they started flashing red as he approached the crossing. That was, is and can be the only proximate cause of the accident in question.[2]

7. *Failure to Circulate the Kruttschnitt Report.*

No one contended in the lower court or contends now that gates aren't generally a better warning device than flashing lights. The real issue is not about notification but whether this crossing was of such a nature that it was gross negligence not to have installed automatic gates prior to the accident in question. The Appellate Court stated it best when it held:

> "We are unable to agree with appellee's contention that the failure to install 'the ultimate' in crossing safety devices in this case constitutes gross or wanton misconduct."

No one testified that the crossing protection here was such as to create a dangerous crossing, only that gates were better than flashing lights without gates.[3]

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[2] The answer to all these claims of a trap are contained in the testimony of an eye witness (Mr. Womack) who said in response to a question concerning the working of the signals when no train was in sight:

> ". . . you see people standing up there and look both ways, and if you don't see no train you go across. . . ." [10 TR 188]

[3] Even Mr. Hamblin, the representative of the State Highway Department recommended the installation of short arm gates,

This crossing, contrary to the misstatement in the Opinion, had a good view in the quadrant from which the train approached the crossing. It was equipped with numerous flashing red lights warning of the approach of the train, which lights had been off a minimum of a minute to a minute and a half prior to their commencing to warn of the approach of the train in question. The train itself emitted a whistle so loud that eye witnesses located approximately a block away had to stop their conversation while it went by. [11 TR 27-28] (Curiously, all of these facts were omitted from the Court's Opinion.)

To hold that failure to have gates in addition to the above warnings resulted in a high degree of probability that serious harm would occur is the nonsequitur of the year.

There never was any contention in this case that all the many warning devices were not working properly at the time of the accident. This means that in addition to the loud repeated warning from the train, six (6) flashing red lights, together with loud-sounding bells which could be heard over a block away were telling the motorist to "Stop." It is under all these admitted facts that failure to install the ultimate in crossing warning devices is not required because there is no high degree of probability that bodily harm will occur under those circumstances. *Southern Pacific Co.* v. *Baca,* 77 Ariz. 173, 268 P.2d 968 (1954). Furthermore, as Mr. Kruttschnitt testified:

> "Q: Did you have an opinion as to the effective warning capabilities of the cantilevered flashing lights?
> A: They are extremely effective."

When questioned by Mr. Haralson about these so-called trap situations, similar to the San Francisco area, Mr.

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which, of course, would not have reached into the lane in which the decedent was driving. [Pl. Exh. 2-II, 7]

Kruttschnitt clearly and succinctly put the matter in perspective: [8 TR 148]

> "Q: Would you agree, sir, in that type of situation, gates would have a very major factor in reducing the possibility of injury in that type of situation? You would agree with that, sir?
>
> A: Not necessarily and I can explain that . . . with almost any type of control circuit, the first train after, very shortly after it passes the crossing, will cause the signals to become dead as you put it. They will cease to flash. Then the following train will again activate them.
>
> Q: Uh-huh?
>
> A: This to me is adequate warning to the motorist.
>
> Q: And you are making the assumption, sir, that the motorist first of all sees them turned off and then sees them turned back on; aren't you sir?
>
> A: Not necessarily. I am making the assumption that he first sees them dark and then sees them flashing."

The testimony in this case, of course, establishes that they were off and then came on as the truck in question slowly approached the crossing. [10 TR 177]

Furthermore, the Opinion omits any reference to the fact that there is no established standard among states and many states including the Arizona State Highway Department on occasion have opposed or refused to allow the construction of gates at crossings. [9 TR 66; 10 TR 34-38]

The Court's failure to distinguish, overrule or much less, cite, *Southern Pacific Co.* v. *Baca, supra,* is incomprehensible. The *Baca* case is factually right on point and the Court's only motive must have been "if we don't talk about it, maybe it will go away."

While the Southern Pacific Transportation Company may well have made an error in either misplacing the doc-

ument when it reached the division level or failing to disburse it to all persons in question, these are not the ingredients of gross negligence. As was held in *Kemp* v. *Pinal Co.*, 13 Ariz.App. 121, 474 P.2d 840 (1970):

> "A person can be very negligent and still not be guilty of gross negligence."

If this crossing, similar to the crossings involved in *Alires* v. *Southern Pacific Co.*, 93 Ariz. 97, 378 P.2d 912 (1963) and *Barnes* v. *Southern Pacific Co.*, 3 Ariz.App. 483, 415 P.2d 579 (1966) had no automatic warning lights and bells activated by predictors so as to give a uniform warning time of 20-30 seconds, one might conceivably argue that this was a case of gross negligence. However, the failure to substitute automatic gates for cantilever flashing lights and flashing 8 lights does not and cannot constitute gross negligence. *Southern Pacific Co.* v. *Baca, supra.*

SUMMARY

The seven grounds cited by the Opinion for upholding the finding of gross negligence fail completely in this regard. The first five all rely upon testimony and facts concerning the operation of the train by the Engineer and Fireman, in whose favor a verdict was returned. Using the Court's own standard, these facts must be taken in a light most favorable to upholding the jury verdict in their favor.

The last two grounds do not provide any basis whatsoever for gross negligence. This was not a trap situation similar to that in California as a reading of the Transcript would have reflected.

Furthermore, this crossing was adequately equipped with automatic electronic devices of such a nature that there was no reason to believe that a person using it with the slightest degree of care would have any risk at all of incurring substantial harm. To say that the failure to sub-

stitute automatic gates for the lights and bells which were working at the time of the accident constitutes gross negligence is only to evidence the animosity behind this Opinion.

II.

Punitive Damages

It is indeed ironic that a railroad which has led the nation in the development of safety devices for crossings such as the predictors and is the nation's leader in the installation of crossing gates should be the first railroad to be hit with such a monstrous and unsupported punitive damage award. [8 TR 110-11] To uphold this award is to abrogate the doctrine of judicial conscience and to hold that anything a jury does untouchable.

This Court has now decided that the failure of a railroad to upgrade the crossing warning devices from the second best (flashing 8 and cantilevered lights with bells) to the ultimate (automatic gates) constitutes gross negligence. In light of this holding, every railroad in the United States is required now, regardless of economic conditions or other demands, to install gates or run the risk of having their assets confiscated by a judicial system which is without a shockable conscience in these cases. It is particularly distressing when the record in this case is clear that notwithstanding Mr. Kruttschnitt's report, many states felt that gates were not the ideal warning device and did not wish them installed:

1. The state of Texas (portions of which fall within the Tucson Division) does not believe in automatic gates and simply won't allow them. [10 TR 37-38]
2. Certain Arizona municipalities oppose the installation of gates. [10 TR 34]
3. The Arizona State Highway Department would approve only the installation of flashing lights, not gates, on state highways in Florence, Arizona. [9 TR 66]

Had the jury returned a verdict for $80,000 it would have been one thing, but to return a verdict for $1,080,000 can lead fair minded people to only one conclusion—the jury was out to get the Southern Pacific and the Supreme Court evidently wishes to put its stamp of approval on this vendetta. The obvious reason behind the jury's verdict was provided by the trial court:

> "... there is one factor that's not—is not in evidence, for which the Court would think might have had some effect on these jurors. I know the Court has been aware of it for a long time, and that is the number of accidents that have been—that the Southern Pacific Company have been involved in in this area over a period of a fairly short period of time, and the criticisms that have gone on in the press about those. I am sure some of those jurors have probably read about those things and the conflict with the Corporation Commission, all those things go to make up the whole picture of say justification for the verdict of the jury." [October 5, 1973; 13 TR 42]

It is beyond belief that a Court can affirm an award of punitive damages for any amount, much less $1,080,000, which is based upon perjured testimony and the logic set forth by the trial court.

III.

How Excessive Does A Wrongful Death Award Have to be Until It Becomes Sufficiently Outrageous to Warrant a New Trial?

The Court acknowledging that the projected lost income of $281,836 would not support the outrageous verdict in this case, stated:

> "It is therefore apparent that the deceased's earning capacity over his life expectancy of 41 years was predicated on the assumption that Lueck could be em-

ployed as an expert welder or journeyman concrete worker."

The Court goes on to say that the jury was not bound to accept that but that they could base their award on other factors such as his maintaining and establishing a "successful going business at the age of 30, which evaluation would be much greater than the purely statistical approach used by Heller."

These assertions are unsupportable by the record on appeal. The Court issued a challenge to appellant based on *Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed2d 309 (1968) to indicate the evidence which will disclose the excessive nature of this award. THE CHALLENGE ACCEPTED.

Mr. Lueck's income tax returns reflected net income for the years in question as folows:

1961	$ 1,676.87
1962	4,417.57
1963	5,834.37
1964	1,121.61
1965	(12,347.38) loss
1966	(489.95) loss

TOTAL INCOME FOR 6 YEAR PERIOD — $213.09

(For the same period of time his *total net loss* from the construction business which the Court glowingly describes as "successful" was $5,953.24)

The Opinion cites as further evidence of his possible success the fact that he had acquired by the time of his death: "3 mixers, 3 dump trucks, 3 loaders, a rock crusher, a steam shovel and blade, and a batching plant." The Opinion omits the fact that these items were heavily encumbered by loans and were not of any substantial net value. One cannot help but be struck by the consistency with which the Court omits essential facts from the Opinion.

If the defendant were negligent and if such negligence caused the death of Mr. Lueck and there were no contributory negligence present, then the defendant should pay that amount of money which would reasonably and justly compensate the deceased's survivors for their loss. That amount of money is not Two Million Dollars. Even if the Court were to double the excessive pecuniary damages of $281,836, the figure would still be less than $600,000. This Court has now said that the jury was justified in awarding $1,718,137 for general damages representing loss of love, affection, comfort, guidance, companionship, supervision and anguish. To sustain this outrageous award, it cites general statements from the record tending to indicate problems of a temporary and certainly not a permanent nature. Furthermore, the Court's reliance on *Compania Dominicana de Aviacion* v. *Knapp,* 251 S.2d 18 (1971) shows that this Court has evidently chosen to go along with the Florida court in giving up all its supervisory power over jury verdicts. The message is clear: from henceforth, no amount of money, punitive or compensatory, is too much.

Having accepted the challenge to show (and we think successfully) the excessive nature of both the punitive and compensatory awards, we in turn challenge the Court to make the effort to consider the following questions which flow from its Opinion:

1. Are there no guidelines anymore in the amount of damage awards?
2. Can the jury give anything it wishes without any restriction?
3. Is the tort system only interested in creating instant millionaires out of plaintiffs and their attorneys?
4. Does anyone on the Court honestly believe that such a compensatory damage verdict would have been rendered against a non-target defendant?

A thoughtful answer to these questions will go a long way to leading to the granting of this Motion and a re-

hearing with oral argument so that the issues may be fully and fairly considered by the Court.

If the Court feels that, "We are not convinced the verdict is so outrageously excessive that it compels the conclusion that it must have been based on passion and prejudice," then the Court is tacitly admitting by this language that it is sufficiently excessive that there should be a substantial remittitur ordered. Why has the Court failed to address this point?

Summary

It borders on the ludicrous to believe that a verdict for Two Million Dollars can be affirmed for the death of a man whose business was on the verge of bankruptcy and which had lost money the two years prior to his death. It is even more ridiculous when that death was brought about by the decedent's failure to heed the numerous clearly visible and audible warnings telling him that a train was approaching and that he must stop his vehicle so as to avoid an accident.

IV.

Was The Defendant's Objection To Plaintiff's Instruction No. 8 That It Allowed The Jury To Find Gross Negligence Even Though It Found No Negligence, Legally Sufficifnt?

Plaintiff's Instruction No. 8 as given, stated:

> "If you find that the defendant was not negligent or that the defendant's negligence did not cause Bill Lueck's death, your verdict must be for the defendant *unless you find the defendant guilty of wilful and wanton misconduct about which I will instruct you later...*" [12 TR 109-110] (emphasis supplied)

To this instruction, which is demonstrably an incorrect statement of the law, Mr. Higgins objected as follows:

> "Dealing with No. 8, I will object to the giving of Instruction No. 8. This Instruction misstates the law insofar as it implies that if you find the defendant guilty of wilful and wanton misconduct then you do not have to find that the defendant is also guilty of negligence. It presupposes that such an act would not be a negligent act as well as places an undue emphasis on the situation and determination of wilful and wanton misconduct. . . ." [11 TR 83-84]

While the courts have held that there is a difference in kind between gross negligence and ordinary negligence, there has never been a decision in this state holding that a jury, after determining that there has been no negligence whatsoever in the case can then go on and make a finding of wilful and wanton misconduct. To the contrary, even this court has specifically held:

> ". . . Wanton negligence has been repeatedly defined by this court. Essentially it involves the creation of an unreasonable risk of bodily harm to another (simple negligence) together with a high degree of probability that substantial harm will result (wantonness). . . ." *Bryan* v. *Southern Pacific Co.*, 79 Ariz. 253, 286 P.2d 761 (1955)

The Court seeks to lump this specific objection to Instruction No. 8 under the objections made to 26(a) and 34, which although somewhat general in nature were still sufficiently clear that the Court should have considered this matter of such great importance upon the merits. Furthermore, if the Court will refer to the Transcript, Volume 11, page 78, it will see that the trial court stated:

> "The record may show counsel and the court in chambers. Court and counsel have spent several hours reviewing the Instructions submitted by the parties; that they have argued the same and the authorities therefor and this is the time for making the record of granting

refusal of modification of Instructions. You may proceed, Mr. Haralson."

The purpose of an objection as set forth in the Court's Opinion is to apprise the trial court and the party offering the Instruction of the nature of the objection. That was accomplished in this case.

Plaintiff's Instruction No. 8 is, was and will always be objectionable on the grounds that it tells the jury that you can find gross negligence without having found negligence. If the Court now believes that such is the law, the Court should state it loud and clear because it will come as a great surprise to the practitioners in this State.

It is inconceivable that any court would make such an unsupportable claim with reference to the objection made to this Instruction. It is even more inconceivable that they would pick such a fallacious ground upon which to avoid coming to grips with a serious legal problem, and particularly in a case involving millions of dollars.

Plaintiff's Instruction No. 8 was prejudicially wrong and the objection to it was stated distinctly with the grounds therefor. This Court can not longer avoid coming to grips with this issue.

IV.

Constitutional Questions Raised By The Court's Opinion

1. *Violation of a Company Rule Constitutes a Criminal Offense under A.R.S. §40-855.*

This interpretation raises serious constitutional questions on the ground of ordinary intelligence as to what conduct is forbidden. Under the Court's Opinion virtually any conceivable act could endanger human life and safety and therefore be a crime. In the case of *Papachristou* v.

City of Jacksonville, 405 U.S. 156, 31 L.Ed.2d 110 (1972) the court held a vagrancy statute void for vagueness on the basis it did not sufficiently inform a person of ordinary intelligence as to what conduct was forbidden. In *Smith* v. *Gouguen,* 415 U.S. 566, 39 L.Ed.2d 605 (1974) the court held a Massachusetts statute void for vagueness which forbade any one to treat the flag "contemptuously." The theory behind these cases is that it violates due process for a statute to fail to give fair notice of the offending conduct.

In *Conally* v. *General Construction Co.,* 296 U.S. 385, 70 L.Ed. 322 (1925) the court held a statute requiring a contractor under criminal penalty to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed" to be void for vagueness. Likewise, in *U.S.* v. *Cohen Grocery Co.,* 255 U.S. 81, 65 L.Ed. 516 (1920) the court held a federal act void for vagueness when it made it a crime for any person to wilfully make "any unjust or unnecessary rate or charge in handling or dealing in or with any necessities."

Here, A.R.S. §40-855 gives no indication to a railroad employee of ordinary intelligence as to what is meant by a "violation or omission of duty whereby human life or safety is endangered." This could cover any number of acts or omissions, therefore, A.R.S. §40-855 as interpreted by the Opinion is void for vagueness.

2. *The Thrust of the Opinion Requiring Railroads to Install Crossing Gates at all Crossings in Arizona Constitutes an Unreasonable Burden on Interstate Commerce.*

While states can impose relatively light burdens on interstate commerce, they are prohibited from putting too great a burden on the free flow of interstate commerce. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 89 L.Ed. 1915 (1945). That case, as the Court is aware, involved the attempt by Arizona to limit the length of trains in inter-

state commerce. For a case even more on point, *See*: *Bibb* v. *Navajo Freight Lines*, 359 U.S. 20, 3 L.Ed.2d 1003 (1959) in which the court in balancing the local health or safety interests against the burden on interstate commerce invalidated a state requirement of installing "contour" mud guards on all motor carriers.

The required installation of gates at all crossings (particularly mainline crossings) or be in jeopardy of the result sanctioned by the Opinion constitutes an undue burden on interstate commerce and cannot pass the constitutional test.

Conclusion

The Court's Opinion has now created a situation where any railroad operating through Arizona had best put in automatic gates at every crossing or preferably do away with the crossings by having grade separations no matter what the cost or to whom. The alternative is to be subjected to confiscatory awards such as the one the Court has put its stamp of approval on in this case. Such a result will have far reaching and long lasting economic ramifications in this State.

When combined with the legal errors and the numerous unexplained omissions from the Opinion, it requires that this Court grant a rehearing with oral argument to fully discuss these errors and omissions.

To do anything less would constitute the final and most unexplainable omission.

Respectfully submitted,

BILBY, THOMPSON, SHOENHAIR & WARNOCK,
By /s/ RICHARD M. BILBY
Attorneys for Appellant

9th Floor Valley National Building
Tucson, Arizona 85701

SERVED BY MAIL this 9th
day of May, 1975, on:
D. DALE HARALSON
BARBER, HARALSON & KINERK
Attorneys for Appellee

ROBERT G. BEGAM
THE ASSOCIATION OF TRIAL LAWYERS
OF AMERICA, ARIZONA BRANCH
Amicus Curiae

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA
MT. DIABLO/MARTINEZ JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA
against
WILLIAM ARTHUR DICKINSON, Defendant(s)

CRIMINAL COMPLAINT

(FELONY)

(FILED MARCH 19, 1975)

STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA, ss.

The undersigned, being sworn, on information and belief accuses WILLIAM ARTHUR DICKINSON, defendant(s) of the crime of: Felony, to wit: VIOLATION OF SECTION 118 OF THE CALIFORNIA PENAL CODE (Perjury) committed as follows, to wit: That said defendant(s) on or about November 2, 1973, at Martinez in Contra Costa County, State of California, did then and there unlawfully, wilfully and feloniously, having taken an oath that he would testify truly in an action then pending in the Superior Court of Contra Costa County, did, contrary to such oath, state as true, material matters which he knew to be false, all of which is contrary to the form, force and effect of the Statute in such case made and provided, and against the peace and dignity of the people of the State of California.

And deponent therefore prays that a warrant may be issued for the arrest of the said defendant(s).

(Name) /s/ W. SAM SMOAK
(Address) 34 St. Stephen Dr.
Oneida, Calif. 94563

Subscribed and sworn to before me on March 18, 1975.
/s/ [illegible]
Deputy District Attorney

THE MUNICIPAL COURT OF THE MT. DIABLO JUDICIAL DISTRICT
COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA

COMMITMENT AFTER PRELIMINARY EXAMINATION (P.C. 872-875)

It appearing to me that the offense in the within complaint mentioned, Felony to wit: violation of section 118 Calif. Penal Code (Perjury) has been committed, and that there is sufficient cause to believe the within named WILLIAM ARTHUR DICKINSON guilty thereof, I order that —he— be held to answer the same, and be admitted to bail in the sum of TEN THOUSAND Dollars and be committed to the Sheriff of the County of Contra Costa until giving such bail.

Dated April 10, 1975.

To apepar in Superior Court, Crim. Dept.; April 22, 1975 at 9:00 A.M.

/s/ [illegible]
Judge of said Municipal Court

(SEAL)

* * * * * * * * * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

No. 18184

THE PEOPLE OF THE STATE OF CALIFORNIA
against
WILLIAM ARTHUR DICKINSON, Defendant

INFORMATION

1) 118 PC

(FILED APRIL 21, 1975)

In the Superior Court of the State of California, in and for the County of Contra Costa:

The District Attorney of the County of Contra Costa hereby accuses WILLIAM ARTHUR DICKINSON, defendant of the crime of Felony, to wit, violation of SECTION 118, CALIFORNIA PENAL CODE (Perjury) committed as follows, to wit: That said defendant on or about November 2, 1973, at Martinez in Contra Costa County, State of California, did then unlawfully, willfully and feloniously being a person who having taken an oath that he would testify truly before a competent tribunal, to wit: Department 8, Superior Court of Contra Costa County, Judge Robert Cooney presiding, in a case in which such an oath may by law be administered, to wit: the trial of Simmons vs. Southern Pacific Transportation Company, etal, County of Contra Costa Civil Action Number R-18232, did unlawfully, willfully and feloniously and contrary to such oath, state as true material matters concerning his identity, education, background and experience which he knew to be false.

WILLIAM A. O'MALLEY
District Attorney

/s/ WILLIAM H. BARTLETT
William H. Bartlett
Assistant District Attorney

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

Date April 22, 1975 Dept. 5
Attn. Richard P. Calhoun, Judge

M. Cramlett, Clerk
Tanya Powers, Reporter

Present:

Dep. D.A. Saul Feiler
Dep. Publ. Def. Marjorie Madonne

Action No. 18184

PEOPLE OF THE STATE OF CALIFORNIA

vs.

WILLIAM ARTHUR DICKINSON, Defendant

Nature of Proceedings:

ARRAIGNMENT—PLEA OF NOT GUILTY
SET FOR TRIAL—MOTION TO
( ) DISMISS ( ) SUPPRESS EVIDENCE

• • • • • • • • • • •

With the consent of the defendant and the District Attorney, the Court fixes June 16, 1975 at 9:00 a.m. as the time for trial by jury of this matter. The Court further fixes 6/6/75 at 1:30 p.m. as the time for pretrial conference. The Court fixes June 12, 1975 at 9:00 a.m. as the time for readiness conference.

(x) Defendant makes a motion to dismiss —— of the —— Information, pursuant to Section 995 of the Penal Code.

( ) Defendant makes a motion to suppress evidence, pursuant to Section 1538.5 of the Penal Code.

(x) The Court grants the defendant's motion to lower bail to $1,000.00.

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The Court orders that Points and Authorities be submitted by defendant prior to May 21, 1975 and by the District Attorney prior to June 4, 1975, and fixes June 6, 1975 at 1:30 p.m. at as the time to hear arguments on said motions.

Defendant is ( ) released on bail ( ) released on O.R. (x) remanded.

J. R. Olsson, County Clerk

By /s/ M. Cramlett
Deputy County Clerk (Court Clerk)

Criminal Minutes

Arraign—Plea—Set for Trial/Motions

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P.C.
Ninth Floor Valley National Building
2 East Congress Street
Tucson, Arizona 85701
Telephone (602) 792-4800

Attorneys for Appellant Southern Pacific Transportation Company

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 11768-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, *Appellant,*

vs.

MELANIE LUECK in her individual capacity and as surviving widow of WILLIAM T. LUECK, deceased, *Appellee.*

Request for Oral Argument

COMES NOW the appellant SOUTHERN PACIFIC TRANSPORTATION COMPANY and requests that the Supreme Court grant oral argument in connection with the Motion for Rehearing.

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P.C.
By "Original Signed by Richard M. Bilby"
Attorneys for Appellant
9th Floor Valley National Building
Tucson, Arizona 85701

SERVED BY MAIL this 9th day of May, 1975, on:

D. DALE HARALSON
BARBER, HARALSON & KINERK
Attorneys for Appellee

ROBERT G. BEGAM
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, ARIZONA BRANCH
Amicus Curiae

BLEED THROUGH

(Caption Omitted in Printing)

The following action was taken by the Supreme Court of the State of Arizona on June 3, 1975, in regard to the above-entitled cause:

"Ordered: Motion for Rehearing—Denied.

Further Ordered: Striking the pleadings in support of said motion as being disrespectful and abusive.

Further Ordered: Statement of Costs approved in the amount of $820.00."

Mandate enclosed herewith.

Clifford H. Ward, *Clerk*
By /s/ Mary Ann Hopkins
Deputy Clerk

To: Harold C. Warnock, Esq. and Richard M. Bilby, Esq., Bilby, Thompson, Shoenhair & Warnock, 2 E. Congress, 9th Floor, Tucson, Arizona 85701

D. Dale Haralson, Esq., Barber, Haralson, Giles & Moore, 32 North Stone, Suite 703, Tucson, Arizona 85701

Robert G. Begam, Esq., The Association of Trial Lawyers of America, Arizona Branch, 1400 Arizona Title Building, Phoenix, Arizona 85003

Hon. Lloyd C. Helm, Judge of the Superior Court of Cochise County, Cochise County Courthouse, Bisbee, Arizona 85603

Hon. Ben C. Birdsall, Presiding Judge of Pima County, Pima County Courthouse, Tucson, Arizona 85701

Mrs. Elizabeth Urwin Fritz, Clerk of the Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

West Publishing Company, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102

Mandate

(Caption Omitted in Printing)

To: The Honorable Superior Court for Pima County, Arizona, in relation to Cause No. 153887

Greetings:

The above cause was presented in your Court and was brought before the Court of Appeals, Division Two, in the manner prescribed by law. That Court rendered its Opinion and caused the same to be filed on the 11th day of July, 1974.

A Petition for Review was Granted by this Court on the 28th day of January, 1975. This Court rendered its Opinion and caused the same to be filed on the 25th day of April, 1975.

A motion for rehearing was timely filed and was denied by order of this Court on the 3rd day of June, 1975.

Now, Therefore, You Are Commanded that such proceedings be had in said cause as shall be required to comply with the Opinion of this Court, a copy of the Opinion being attached hereto.

Witness, The Honorable James Duke Cameron, Chief Justice of the Supreme Court of the State of Arizona, this 4th day of June, 1975.

Clifford H. Ward, *Clerk*
By /s/ Mary Ann Hopkins
Chief Deputy Clerk

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T-A-X-A-T-I-O-N
COSTS OF APPELLEE

Clerk, Court of Appeals Filing Fee	$15.00
Clerk, Supreme Court Filing Fee	15.00
Appellee Answering Brief Preparation and Printing	790.00
Total Costs	$820.00

The original of the foregoing MANDATE and copy of the Opinion of the Court were mailed to the Clerk of the Superior Court of Pima County, Arizona, this 4th day of June, 1975. A copy of the MANDATE was mailed on said day to Bilby, Thompson, Shoenhair & Warnock; Barber, Haralson, Giles & Moore; The Association of Trial Lawyers of America, Arizona Branch; Hon. Lloyd C. Helm, Judge of the Superior Court of Cochise County, Trial Judge; Hon. Ben C. Birdsall, Presiding Judge of the Superior Court of Pima County; Clerk of the Court of Appeals, Division Two; Mrs. Edna Blank, Court Administrator of Pima County.

CLIFFORD H. WARD, *Clerk*
By /s/ MARY ANN HOPKINS
Chief Deputy Clerk

(Caption Omitted in Printing)

Mrs. Frances C. Gibbons, Clerk
Superior Court of Pima County
Pima County Courthouse
Tucson, Arizona 85701

Re: Southern Pacific Transportation Company
v. Melanie Lueck etc.
Supreme Court No. 11768-PR
Court of Appeals No. 2 CA-CIV 1578
Pima County No. 143887

Dear Mrs. Gibbons:

Enclosed herewith is the Mandate along with a copy of the decision handed down by this Court in the above-referenced matter. We are also returning your records as follows:

Instruments—3 parts

Minute Entries

Reporter's Transcripts (21 volumes)

Depositions (31 volumes)

Exhibits (as listed on your Exhibit List dated July 30, 1973)

Please sign the enclosed copy of this letter and return the same to this office as our receipt.

Very truly yours,

Clifford H. Ward, *Clerk*
By /s/ Mary Ann Hopkins
Chief Deputy Clerk

ald

Enclosures

cc: Harold C. Warnock, Esq. and Richard M. Bilby, Esq., Bilby, Thompson, Shoenhair & Warnock, 2 E. Congress, 9th Floor, Tucson, Arizona 85701

D. Dale Haralson, Esq., Barber, Haralson, Giles & Moore, 32 North Stone, Suite 703, Tucson, Arizona 85701

Robert G. Begam, Esq., The Association of Trial Lawyers of America, Arizona Branch, 1400 Arizona Title Building, Phoenix, Arizona 85003

Bilby, Thompson, Shoenhair & Warnock, 2 E. Conald

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

Supreme Court No. 11768-PR

No. 143887

MELANIE LUECK in her individual capacity and as surviving widow of William T. Lueck, *Plaintiff*,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware Corporation, *Defendant*.

Report and Decision

Court of Appeals

No. 2 CA-CIV 1578

The Supreme Court of the State of Arizona having remanded the above entitled matter to this Court for determination of certain matters, the trial Court reports as follows:

In discussing briefly some of the matters considered by this Court in making the determination required by the Mandate of the Supreme Court, this Court will refer to the question of whether or not, pursuant to Rule 60(c), the asserted newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., as the first question. The question of whether or not the asserted newly discovered evidence is of such a character as to give reasonable assurance that it will work a different result upon retrial will be designated as the second question.

In considering the first question, it is clear that the railroad company had numerous special agents, police officers, and a large legal staff in its employ for the purpose of investigating the facts of all cases, and had unusual facilities for discovering the truth and the real facts and for pre-

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paring cases for trial. This is amply demonstrated by the results of the efforts of such employees after they began their investigation into the question of the asserted perjury. It is felt that very simple inquiries, in the early stages, directed to one or more of the numerous references set forth by Dickinson in his very detailed "resume" of his educational background and experience, would have raised enough question that a more complete investigation might have been advisable, with possibly the same findings as revealed by Southern Pacific in this case and by the Defendants in the proceedings in chambers in the case before the Superior Court of San Joaquin County, California, on June 12, 1974. (Torres vs. National Abrasive Company, No. 103899, Dept. 7, San Joaquin County, California, in which the same witness was alleged to have given perjured statements regarding his qualifications.)

The Appellant was advised by the Plaintiff about six weeks before trial that Dickinson would testify as an expert in the trial, and his deposition was taken on July 19, 1973, at which time the expert's resume on his educational background, training and experience was furnished Appellant. In the resume, the expert listed, among others, ten other cases in which he had been consulted or testified during the year prior to the resume, cases involving crossing accidents in which the Southern Pacific Company was a Defendant. It is apparent that Mr. Dickinson was not a total stranger to the legal staff of Southern Pacific Company prior to, during and subsequent to the instant trial. There is no showing of what diligence, if any, was used by Appellant to discover the omitted evidence until a short time before the filing of its Motion for New Trial in the Supreme Court on February 18, 1975, or until the expert was unmasked in the San Joaquin County case. No diligence whatsoever seems to have been exercised by the Appellant in inquiring into the qualifications of Dickinson, although it has had, and did have in this case, ample opportunity to do so.

Considering the second question, this Court cannot give reasonable assurance that the asserted newly discovered evidence is of such a character that it will, or would, work a different result upon a retrial.

Casting aside the witness' testimony concerning his educational background and experience, his testimony was merely that of a typical accident reconstruction expert.

As a matter of fact, counsel for the Appellant have never questioned the truth of Mr. Dickinson's material testimony concerning the speed of the train, speed-distance-time calculations, stopping distances, etc. The witness' opinions and conclusions concerning the pertinent portion of his testimony were verified for local trial counsel by the railroad company's representatives in their San Francisco offices. All concerned were satisfied with the conclusions, procedures, formulas used, etc., to the extent that no expert testimony was offered at the trial to contradict his accident reconstruction testimony. There has never been a contention on the part of the railroad that the technical testimony was false or inaccurate, despite the fact that his testimony concerning his credentials may have been false.

The only possible use for the asserted newly discovered evidence would be for the purpose of impeachment. It is indicated that Dickinson's testimony based upon the formulas used, mathematical computations, data used, etc. were in accordance with commonly accepted standards, and would not be expected to be different on a new trial. At least, Appellant has not argued this, and we must therefore assume that it is true.

There would appear to be sufficient evidence in the record as to speed, etc. to justify the verdict even without the testimony of Dickinson.

The Court having heard the argument of the attorneys applicable to the questions submitted to this Court by the Supreme Court for determination under its Mandate, hav-

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ing considered the voluminous record, pleadings, memoranda submitted by the parties, and evidence submitted, the Finding, Judgment and Determination of the Court is as follows:

1. Pursuant to Rule 60(c), the asserted newly discovered evidence *could* have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S.

2. The asserted newly discovered evidence is *not* of such a character as to give reasonable assurance that it would work a different result upon a retrial.

DONE IN OPEN COURT this 8th day of August, 1975.

/s/ LLOYD C. HELM,
Judge

TO: Bilby, Thompson, Shoenhair & Warnock, 2 E. Congress, 9th Floor, Tucson, Arizona 85701

D. Dale Haralson, Esq., 32 North Stone, Suite 703, Tucson, Arizona 85701

Robert G. Begam, Esq. The Association of Trial Lawyers of America, 1400 Arizona Title Building, Phoenix, Arizona 85003

Supreme Court, State of Arizona, Capital Building, Phoenix, Arizona 85007

Hon. Ben C. Birdsall, Presiding Judge Pima County Courthouse, Tucson, Arizona 85701

Mrs. Elizabeth Urwin Fritz, Clerk of Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

West Publishing Companny, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102

IN THE SUPREME COURT OF THE STATE OF ARIZONA

Supreme Court No. 11768-PR

No. 2 CA-CIV-1578

Pima County Superior Court No. 143887

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, *Appellant,*

vs.

MELANIE LUECK, in her individual capacity and as surviving widow of William T. Lueck, *Appellee.*

Objection to Finding, Judgment and Determination of Trial Court

INTRODUCTION

This Objection is made pursuant to the Opinion of the Supreme Court in this case delineating the procedure to be followed after the hearing on the remand by the Supreme Court to the Trial Court.

STATEMENT OF THE CASE

The Supreme Court on the 25th day of April, 1975, issued its Opinion in this matter, vacating the Appellate Court Decision; subsequently, a Motion for Rehearing was denied on the 3rd day of June, 1975, without oral argument and the pleadings in support thereof were struck as being "disrespectful and abusive."

The matter was then set for hearing by the Trial Court on the 26th day of June, 1975. Prior to the hearing the following pleadings were filed:

1. Notice of Deposition for Carl Waag (June 6, 1975);
2. Notice of Deposition for Allen William Dickinson (June 12, 1975);

3. Motion for Protective Order filed by appellee on June 13, 1975;

4. Motion to Take Depositions filed by appellant on June 17, 1975;

5. Motion for Continuance filed by appellant on June 24, 1975.

At the time of the hearing, the Court took under advisement all of the Motions, specifically stating:

> "Well, let's just put it this way. As far as that deposition is concerned, that will not be had until further order of the court. If the court determines that depositions can be had, it can be set at a different or later time. . . . Insofar as the taking of any depositions, until such time as there is a ruling by the court, the depositions will not be taken."

By separate Order, the Court held on August 8, 1975, that since the perjury was undisputed the Motions would all be denied.

Statement of Facts

The case was remanded to the Trial Court for a determination:

> "The Superior Court shall determine, pursuant to Rule 60(c), whether the asserted newly discovered evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., and whether it is of such a character as to give reasonable assurance that it will work a different result upon retrial."

Evidence on Perjury by Plaintiff's Reconstruction Expert

Pursuant to Rule 42(c)(d) Arizona Rules of Procedure, appellant moved for a continuance in this matter so as to

have a reasonable opportunity to produce its witnesses from England and various distant parts of the United States to prove the perjury of the plaintiff-appellee's reconstruction expert (copies of the Motion and Affidavit are attached hereto as Exhibit 1). This Affidavit which was not contested conclusively establishes that the plaintiff's perjurer assumed the identity of Allen William Dickinson, a graduate of Cambridge University, England, who held two degrees, and upon assuming that identification managed to commit wholesale perjury throughout the Western United States against the Southern Pacific and other railroads as well as other parties in litigation. (Exhibit 1) The Trial Judge admitted as much in his order dated August 8, 1975. (Exhibit 2 attached hereto)

Appellant also sought to take the deposition of the plaintiff's perjurer (Mr. Dickinson) and one Carl Waag, a member of the Arizona Bar, and the person allegedly responsible for procuring the perjurer's participation in this case. The purpose of these depositions being to show the cleverness of the perjurer's scheme, which would have been most relevant to the issue of due diligence in discovering the existence of perjury in this case.

The extent of the perjury is uncontested and the evidence, on the question of due diligence, demonstrated the following:

1. The plaintiff's perjurer's deposition was taken on July 19, 1973, approximately two weeks prior to the trial of this case; (approximately six (6) years after the case was filed)
2. Three (3) days after the deposition, additional information was furnished to the appellant's counsel by appellee's counsel;
3. The trial commenced on the 31st day of July, 1973, and concluded on the 17th day of August, 1973;

4. A timely Motion for New Trial was filed with the court on the 27th day of August, 1973;

5. Thirty-eight (38) days elapsed between the taking of the plaintiff's perjurer's deposition and the date the Motion for New Trial was filed.

Three witnesses testified at the hearing: Mr. Gino Manicci, an Assistant District Claims Agent for the Southern Pacific; Mr. D. B. Udall, a practicing attorney in Tucson, Arizona; and Mr. T. Scott Higgins, an attorney practicing in Tucson, Arizona, formerly with the firm representing the appellant and the lawyer who tried the case in question.

Mr. Manicci was the first person able to prove that plaintiff's perjurer, Mr. Dickinson, was in fact a fraud. This was accomplished after an attorney taking Dickinson's deposition in a case in California discovered a factual discrepancy about his war service. [TR-43] [1] When Mr. Manicci first called Cambridge University in England, they verified that Allen William Dickinson had graduated from St. John's College, Cambridge University with BA and MA degrees in engineering. [TR-34] [2]

Mr. Manicci subsequently checked with the Immigration Service and approximately three to four weeks later was shown a file by the United States Immigration Service which included a picture of the plaintiff's perjurer. It was then and only then that Mr. Manicci was able to confirm that plaintiff's perjurer was in fact a fraud. [TR-36]

After approximately three to four months of further intensive investigation, it became possible to prove that

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[1] All references to TR are to the Transcript of testimony taken at the June 26, 1975 hearing.

[2] This coincided with the information that Mr. Dickinson had testified about with the exception that it did not include the fact that he claimed to have a Fellowship and/or Ph.D.

plaintiff's witness was, in fact, a fraud and a perjurer. [TR-36-38]

Mr. Udall, an attorney with 21 years of practice in Pima County, representing insurance firms in defense work, stated that in all his experience, he had never written or called an educational institution to see if a particular witness had a degree or degrees as claimed. [TR-51]

He further stated in response to a hypothetical question that under the facts of this case it was his opinion:

> " . . . a lawyer using due diligence in this community would not have checked with his, whatever he said he graduated from or wherever he claims he had worked at . . . ."

In answer to a question by plaintiff's counsel as to whether or not, assuming he had Claims Agents available to him and there was a new expert in town, he would have checked on his background, he stated:

> "I think I am saying that, Dale, I don't know as I have ever gone to ask my client, an insurance company, to check with Stanford or Yale or Harvard or wherever the man told me he graduated from. I also work under the assumption that they are telling the truth unless I have some reason to the contrary."

Nature of the Perjury

The perjured testimony went to the perjurer's qualifications to testify as an expert. (Exhibit 1) The appellant established through the Engineer and the Fireman that the speed of the train was within the City's speed limits of 60 mils per hour. Without the testimony of the plaintiff's perjurer, there was no testimony in the record to support a speed of the train in violation of the City Ordinance.

The Supreme Court's reliance upon the plaintiff's perjurer's testimony was set forth on pages 8 and 9 of its Opinion. On page 8 it stated:

> "The plaintiff's reconstruction expert testified that in his opinion, because of the distance required to bring the work train to a stop and other factors, it was traveling at a speed of up to 70 miles per hour. If the work train had been traveling 40 miles per hour, according to the same expert, there would have been no collision."

Then, again on page 9, it showed its further reliance upon this perjury by holding:

> "Since the speed limit for trains was fixed at 60 miles per hour through the City of Willcox and since the work train was running at the estimated speed of as high as 70 miles per hour, it could have concluded that the work train was being operated in violation of the speed law and that such constituted negligence per se."

Argument

Due Diligence

The Trial Court was required by the Mandate of the Supreme Court to make a two-fold finding. The first determination was whether or not, pursuant to Rule 60(c), the newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rule 59(b).

The Trial Court in holding that the defendant did not exercise due diligence in discovering the perjured qualifications of the witness, stated:

> "the railroad had numerous special agents, police officers and a large legal staff in its employ for the

purpose of investigating the facts of all cases, and had unusual facilities for discovering the truth and the real facts and for preparing cases for trial."

The Court goes on to say that if simple inquiries had been made in the early stages, enough suspicion would have been aroused to warrant further investigation. The Court goes on to conclude that the defendant's failure to institute an investigation concerning the qualifications of the plaintiff's perjurer was tantamount to a failure to exercise due diligence. If the Trial Court's analysis of those facts necessary to satisfy due diligence are accepted, a new obligation of counsel will have been conceived. Responsibility for assuring that witnesses are legitimate will now rest with the adverse party rather than the party presenting them. Moreover, the custom and practice of the practicing bar does not place the responsibility of discovering dishonest witnesses upon an adverse party. [TR-51]

The Trial Court indicates that the size of a party and the investigatory staff available to that party have some effect in determining whether due diligence has been exercised. The defendant is unable to discover any authority for such a proposition. The defendant concedes that the determination of whether or not due diligence has been exercised is usually a factual determination within the discretion of the court. However, the defendant has discovered no case, in either Arizona or in any jurisdiction of the United States, which has extended the responsibilities of due diligence to such lengths.

Arizona cases regarding due diligence are readily distinguishable from the case at bar. *Sabin* v. *Rauch*, 75 Ariz. 275, 255 P.2d 206 (1953) is often cited for its statements regarding due diligence. A motion for new trial was presented by the defendant when certain liens upon the land were discovered by the defendant. The trial court denied the motion and held that due diligence was not exercised.

The newly discovered evidence in that case pertained to liens upon land which was occupied by the defendant. It was noted that eight months transpired from the time defendant took position of the land to the time the liens became due. It was held that it was a lack of due diligence to discover those liens in that period of time.

In *Chambers* v. *Taber*, 21 Ariz. App. 291, 518 P.2d 1008 (1974), the decedent was killed while on defendant's land. Defendant maintained that because of an assignment of a leasehold interest they were not in possession of the land at the time of plaintiff's death. Plaintiff moved for a new trial on the basis of a document which demonstrated that the defendant was in fact in possession or control of the property at the time of decedent's death. The court denied the motion and held that since the document was in plaintiff's possession for eight months prior to trial due diligence was not exercised in discovering the date of execution of the document.

In *Ghyselinck* v. *Buchanan*, 13 Ariz.App. 125, 474 F.2d 844 (1970), plaintiff subpoenaed certain documents from defendant. The defendant informed plaintiff's attorney that those documents were in his possession but plaintiff failed to call for their production at trial. The plaintiff, on the basis of this information, moved for a new trial. The court denied the motion stating that due diligence has not been exercised in the discovery of that evidence.

In *Schneider* v. *City of Phoenix*, 9 Ariz.App. 365, 452 P.2d 521 (1969), the plaintiff moved for a new trial based upon a report which plaintiff classified as newly discovever evidence. The court denied the motion holding that the report could have been discovered with the exercise of reasonable discovery procedures.

These cases are all factually distinguishable from the case presented to this Court. Conscientious preparation or use of discovery methods would have revealed the evidence in each of the cited cases. This is quite different from dis-

covering that an expert witness had assumed the name and identity of another in order to falsify his qualifications at trial. For this to come to light, a complete investigation would have to be executed. To impose such a duty in each case involving expert testimony would be totally unreasonable and unjust. Moreover, if this responsibility is going to be imposed upon a party, it should be placed with the party representing the witness, not the adverse party.

The uncontested statement of facts demonstrates that a period of only thirty-eight (38) days elapsed from the time the plaintiff's perjurer's deposition was taken to the day the Motion for New Trial was filed. [Once the defendant became aware of the possibility that plaintiff's witness was a perjurer, it exercised all due diligence to gather information which would either support or disavow the allegations.]

Approval of the Trial Court's analysis of due diligence of this defendant transcends the facts of this case. Placing a burden upon a party prior to trial to discover the integrity of each witness presented by the adverse party, perverts the adversary system. Moreover, when this burden is either increased or decreased depending on the size and investigatory staff available to a party, it is tantamount to a denial of a party's constitutional right to due process and equal protection of law.

Defendant maintains that it exercised due diligence in revealing the newly discovered evidence. Consequently, the defendant maintains that it has fulfilled the first prerequisite to the granting of a motion for new trial.

Further evidence of the extent to which plaintiff's perjurer went to hide his identity would have been produced had appellant been allowed to take his deposition. Likewise, the deposition of Carl Waag would have borne materially on the issue of due diligence. It seems strange that a court would not be vitally interested in discovering what

involvement a member of the State Bar had in producing plaintiff's perjurer at the last moment before trial.

This rush to judgment cannot help but raise further doubts as to the validity of the Trial Court's finding that the defendant was guilty of lack of due diligence in not unmasking the plaintiff's perjurer during the thirty-eight day period from deposition to the filing of a Motion for New Trial.

Different Result Upon Retrial

The Trial Court has determined that the newly discovered evidence would not effect a different result upon retrial. The Trial Court prefaces his explanation by stating:

> "[c]asting aside the witness' testimony concerning his educational background and experience, his testimony was merely that of a typical accident reconstruction expert."

Defendant maintains that this deficiency of the expert cannot merely be case aside. Indeed, the educational background and experience of this expert are the crux of the question presented to the Court. If the Trial Court is permitted to gloss over the pivotal question of this appeal, then certainly the basis of the decision becomes suspect.

In the first instance, it is the Trial Court's obligation to determine whether a witness possesses those qualifications necessary to qualify as an expert. *Carrel* v. *Lux*, 101 Ariz. 403, 420 P.2d 564 (1966); *Lowery* v. *Turner*, 19 Ariz.App. 299, 506 P.2d 1084 (1973). Had the Trial Court been aware that the alleged expert in this case did not possess the educational or experiential background that he claimed, there is no question but that a different result would have occurred. If the witness was unable to establish the fact that he was in fact an expert, his testimony and opinions would have been rejected by the Court. Without the testimony of the plaintiff's perjurer, there was no evidence to

support the Instruction given or the statement in this Court's Opinion as to speed. Without such evidence it can hardly be denied that the jury would have reached a different result. Moreover, the Trial Court must have considered it appropriate that expert testimony be given, for if the evidence was of such a nature that jurors could have formed reasonable opinions for themselves, then expert witness testimony would have been rejected. *Hinson* v. *Phoenix Pie Co.*, 3 Ariz.App. 523, 416 P.2d 202 (1966).

Based upon this perjurer's testimony the Court instructed the jury as follows:

> ". . . Three, an ordinance of the City of Willcox limited the speed of trains to sixty miles per hour within the city limits. Should you find that any party to this suit violated any of the above laws then that party would be guilty of negligence as a matter of law and you should not debate the issue further, but should then consider whether that negligence is the proximate cause of the injury or death." [12-TR, 113]

Without the perjured foundation the plaintiff's "expert" could not establish himself as an expert. One cannot construct a building, much less a skyscraper, upon such quicksand. Without plaintiff's perjurer's testimony, the plaintiff's case failed to include competent evidence of the speed of the train in excess of the speed limit. As indicated by the Jury Instruction, the speed of the train was an essential element in this case, and the lack of testimony regarding the speed of the train would certainly have affected the outcome of the verdict.

The Trial Court in its determination that the newly discovered evidence would not work a different result upon retrial asserts that the substantive testimony given by the perjured witness was technically correct. The clear implication of this statement is that upon retrial another expert would give the same testimony and therefore a different

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result would not be probable.[3] This logic is specious; adherence to it completely ignores the role of the jury in in a trial.

It is well settled that jurors are the sole judges of the credibility of witnesses. *Batt* v. *State,* 28 Utah 2d 417, 503 P.2d 855 (1972). They were so instructed in this case:

> "You as jurors are the sole judges of the credibility of the witnesses, who is telling the truth, who is mistaken, whose testimony is accurate. Questions of this nature are for you alone to determine uninfluenced by the Court in any way. The Court does, however, give you this cautionary instruction: In determining the weight to be given to the testimony of any witness you should take into account his demeanor on the stand, his manner of testifying, whether he was frank and and open, whether he might have any interest in the outcome of the case and whether he is in any way biased or prejudiced." [12-TR, 106]

This Instruction makes it quite clear that more than the substance of the testimony of a witness is to be considered by a jury. To allow the Trial Court, at this point, to state that since the substance of the opinion testimony may have been fairly accurate, the jury would not arrive at a different result, if a different expert were testifying, is patently erroneous. This witness attributed to himself not merely adequate credentials but qualifications of the highest level. His self-acclaimed accomplishments had to have been considered by the jury in assessing his credibility. Indeed, it was the jury's obligation to consider those qualifications as the Court instructed them:

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[3] This, of course, presumes three things:

a) That the new witness will not be another perjurer;
b) That he or she would testify the same way; and
c) That the new witness would be as effective an advocate as was the plaintiff's perjurer.

> "The rules of evidence ordinarily do not permit the opinion of witnesses to be received as evidence. An exception to this rule exists in the case of expert witnesses. *A person who by education, study and experience has become an expert* in any science or profession *may give his opinion as to any such matter.* You should consider such expert opinion and should weigh the reasons, if any, given for them; however, you are not bound by such opinion . . . ." [7-TR, 120] (emphasis added)

Acceptance of the Trial Court's reasoning is to assume the jury totally disregarded these Instructions and paid no attention to plaintiff's perjurer. This Court is aware that the jury was obligated to consider the demeanor, manner of testifying and frankness of a witness in determining the credibility to be attributed to him. Moreover, the qualifications of a witness should be considered by the jury in their determination of the degree of weight to attribute to the witness' testimony. *Webb* v. *Mathieson Chemical Corp.*, 342 P.2d 1094 (1965).

The Trial Court, however, under the auspices of a Motion for New Trial, apparently has determined that the jury's assessment of credibility of a witness has no effect on the final verdict which it renders. Indeed, the Trial Court's opinion completely ignores the fact that the credentials espoused by the alleged expert were worthy of the utmost respect and given such by plaintiff's counsel in his final argument to the jury when he stated:

> "Speed in excess of ordinance: Now the City ordinance that was established was 60 miles per hour through there. Dr. Dickinson *and you will recall his qualifications;* I am not going to go through them, gave you these figures. Not only were they violating the company rule on the yellow light; they were violating the City ordinance and they have got a speedometer that tells them that.

> Now what makes these the most valid? Besides Dr. Dickinson's qualifications and besides his expertise, why are these so valid?" [12-TR, 13] (emphasis added)

Why the Trial Court fails to come to grips with this issue or even mention it in its Order is incredible.

All of the members of this Court were trial judges at one time. We ask that you search your memories—what would you have done had it been brought to your attention during a trial that a key expert witness on liability had committed perjury as to his qualifications during the trial. We cannot believe that any member of this Court would not have:

1) Immediately stricken the perjurer's testimony; and, more probably

2) Ordered a mistrial.

Can anyone honestly say such actions would not have affected the jury or the result in this case. This Court cannot put its stamp of approval on the Trial Court's proposed double standard of justice. There is no basis for a court holding it will deal swiftly and effectively with perjury when discovered during the trial, but will overlook it when not discovered until after the time for filing a Motion for New Trial has expired.

This Court has referred to an annotation discussing perjured testimony in 38 A.L.R. 3rd 812. A close analysis of these cases clearly demonstrates their distinguishability from the case at bar.

Barton v. *Plaisted*, 109 N.H. 428, 256 A.2d 642 (1969) and *Ginnelly* v. *Continental Paper Co.*, 57 N.J. Super. 480, 155 A.2d 154, both involved expert witnesses who had falsified certain of their qualifications. Motions for new trials were denied in both of the cited cases on the basis that the

expert witnesses, while to some degree falsifying their qualifications, did in fact have technical, practical or educational experience which would have qualified them anyway. This is quite different from the case before this Court where there is no evidence that plaintiff's perjurer possessed any of those qualifications necessary to establish himself as an expert witness.

Freeman v. *Jergins,* 271 P.2d 210 (1954), did not involve the qualifications of the expert witness. In fact, the court stated that its decision was not based on the testimony of any of the expert witnesses presented.

A motion for new trial in *Williamson* v. *Wabash R. Co.,* 355 Mo. 248, 196 S.W.2d 129 (1946) was made on the basis of perjured expert testimony regarding plaintiff's injuries. The court denied the motion and held that the testimony did not go to the liability of defendant but only to the extent of injuries. The clear implication of *Williamson* is that had the testimony been directed at the issue of liability, as is the case before this Court, then, the motion would have been properly granted.

Hart v. *Kansas City Public Service,* 142 S.W.2d 348 (Mo.App. 1940) and *Donati* v. *Gualdoni,* 358 Mo. 667, 216 S.W.2d 519 (1949) clearly support this defendant's argument for granting a new trial.

In *Hart,* plaintiff's expert, a physician, perjured his testimony regarding certain x-rays. The defendant moved for a new trial which motion was denied. In denying the motion the court recognized the fact that the perjury committed had been fully developed before the jury so they were fully able to assess the witness' credibility in light thereof. Furthermore, it was noted that if the perjury did have an effect upon the jury it was detrimental to the plaintiff, not the defendant. The jury in this case was wholly deprived of information relating to the perjured testimony. Also, any detrimental effect of the perjury was against the defendant, not the plaintiff. The mandate of

Hart is that had the jury been unaware of the perjury a new trial would probably be granted.

In *Donati,* a motion for new trial was granted by the trial court. It appears that an expert gave false testimony regarding a principle issue in the case. The materiality of the issue which was supported only by the perjured testimony, required that the motion for new trial be granted. The same rationale is applicable to this case.

Plaintiff's perjurer here, gave false testimony concerning a material issue in much the same manner as did the expert in *Donati.* First, the witness perjured himself as to his qualifications. Then, qualifying himself as an expert, on the basis of perjured testimony, he testified to the speed of the train at the time of the accident; this was a principle issue in this case.

It is therefore apparent that in this case, as in *Donati,* a motion for new trial should be granted on the basis that the newly discovered evidence of the alleged expert's lack of qualifications certainly upon retrial would result in a different outcome.

The judicial system was prostituted by the alleged expert witness and the jury throughout the entire process was misled as to essential testimony. Yet, in complete disregard of the mandates of Arizona law the Trial Court has now determined that the perjured testimony of an expert witness did not affect the result reached by the jury. It has been stated that:

> "[i]n view of the importance of the function entrusted to the expert witness, it is of great importance that the court carefully scrutinize his qualifications to guard against being led astray by the psuedo learned or charlatan who may purvey erroneous or too positive opinions without sound foundation." *Webb* v. *Olin Mathieson Chemical Corp.,* 342 P.2d 1094, 1097 (1965).

Defendant concludes that as a matter of law the jury was mandated to consider the testimony of the expert in this case. The verdict in favor of plaintiff clearly demonstrates that the jury not only considered but accepted the testimony of the alleged expert. The only conclusion which can be drawn is that the jury verdict was affected by the perjured testimony and that had the jury known of the invented qualifications of the witness, a different result surely would have followed.

Conclusion

Prior to this case, it would have been inconceivable that an attorney and his client would be accused of a lack of due diligence in not discovering within a thirty-eight day period (commencing two weeks before trial, extending through three weeks of a hard-fought trial, and the ten days thereafter) that a cleverly disguised perjurer, who had assumed the identity of an individual in England and adopted his credentials, was, in fact, a fraud. If this is the law, then never again can we trust our brothers nor rely upon their integrity. It will be open season—anything will be permitted as long as it is not discovered prior to the filing of a motion for new trial.

The Trial Court's holding does great violence not only to the interprofessional relationship, more seriously, it constitutes an *invitation for perjury.*

This invitation is implicit in the holding that a lawyer no longer has any responsibility or risk for verifying to the court or counsel that his own witness is what he says he is. To the contrary, the rule allows an attorney to unknowingly bring forth a professional perjurer as long as it is not discovered prior to the motion for new trial. Furthermore, a judgment based upon the perjurer's testimony will be sustained because at some later date some other witness might testify to same or similar opinions. It is beyond belief that this Court would put its seal of ap-

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proval on such shabby practices. If it does, an honorable profession is headed for dark days.

Counsel cannot refrain from quoting the statement made to him recently by a well-known plaintiff's lawyer in this town:

> "My God, could any court support a verdict based upon the perjury of a man who is proven beyond doubt to be a fraud."

Let us hope not.

Respectfully submitted,

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P.C.
/s/ By RICHARD M. BILBY
Ninth Floor
Valley National Building
Tucson, Arizona 85701

Motion

(Caption Omitted in Printing)

Comes Now the appellant and moves the Court for an order:

1. Granting and setting a time for oral argument in this matter;
2. Granting the appellant the right to file a Reply Memorandum to the Response of the appellee to the Objections filed herewith to the Trial Court's Findings, Judgment and Determination dated August 8, 1975;
3. Designating as part of the record in this matter the Transcript of the hearing held on June 26, 1975.

The requests made herein, where deviant from the Rules of the Supreme Court, are made pursuant to Rule 26 in the furtherance of justice.

Respectfully submitted,

Bilby, Thompson, Shoenhair & Warnock, P.C.
/s/ By Richard M. Bilby
Ninth Floor
Valley National Building
Tucson, Arizona 85701

Memorandum of Points and Authorities

This Motion is based upon the record that the Supreme Court has not allowed counsel for either party to be heard in this matter; that the pleadings supporting the Motion for Rehearing have been stricken; that any determination of this case without a thorough review of the Transcript of the June 26, 1975 hearing would constitute a violation of the appellant's rights; and that the time constraint placed upon the appellant together with the Court's failure

to allow it an opportunity to reply to appellee's Response would be unreasonable, unjust and in contravention of the appellant's constitutional rights to a full and fair hearing.

Under the circumstances of this case with so much at stake and the integrity of our court system on the line, as the Court is being asked to put its seal of approval upon a judgment based upon admitted perjury, there can be no valid reason for not granting the Motion in question.[1]

SUMMARY

Due process under the Federal and State Constitutions requires that the appellant be given a hearing on its appeal in this matter and that the necessary record be completed so that the Court will have a complete record before it prior to making its determination.

Respectfully submitted,

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P.C.

/s/ By RICHARD M. BILBY
Ninth Floor
Valley National Building
Tucson, Arizona 85701

* * * *

[1] Appellant would point out to the Court that it has already paid for and had the Transcript of the testimony at the June 26, 1975 hearing filed with the Clerk of the Superior Court.

(Caption Omitted in Printing)

(Filed October 7, 1975)

Appeal from the Superior Court of Pima County

Honorable Lloyd C. Helm, *Judge*

Supplemental Opinion

Judgment Affirmed

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Struckmeyer, Vice Chief Justice

On February 18, 1975, while this matter was pending for decision, appellant Southern Pacific Transportation Company filed with this Court a motion to supplement the record. The motion was supported by an affidavit that the plaintiff's reconstruction expert, one A. W. Dickinson, did not have the expert qualifications to which he had testified at the trial. It was based on newly discovered evidence and filed assertedly under the authority of Rule 75(h) of the Rules of Civil Procedure, 16 A.R.S.

On April 25, 1975, this Court rendered its decision, Southern Pacific Transportation Company v. Melanie Lueck, Cause No. 11768-R, ... Ariz. ...., 535 P.2d

599 (1975). In it we held that Rule 75(h) did not authorize the supplementation of the record with evidence which might have been relevant to the issues tried in the Superior Court, saying that a motion for new trial filed in the Supreme Court was not addressed to its appellate jurisdiction but was in the nature of an original proceeding which the Court would not entertain. However, in the interests of justice we concluded to return the cause to the Superior Court, under the authority of the constitutional provision, Article 6, § 5, subsec. 5. We said:

> "Since it is palpably impossible for the members of this Court to determine whether the asserted perjury was such as to probably affect the outcome upon a retrial * * * we have decided to treat defendant's motion as a timely motion for a new trial under Rule 60(c), Rules of Civil Procedure, 16 A.R.S."

The case was remanded to The Honorable Lloyd Helm, Judge of the Superior Court of Cochise County, who, having had the opportunity to see and hear the witness, had the necessary feel for the case, to determine first, pursuant to Rule 60(c) whether the asserted newly discovered evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., and, second, whether the asserted newly discovered evidence (perjury) was of such a character as to give reasonable assurance that it would work a different result upon retrial. In order to obviate the necessity of another appeal, we directed the Superior Court to advise this Court of its ruling, giving both parties ten days within which to file objections and ten days within which to respond, saying that this Court would then affirm the judgment or reverse with an order directing a new trial as it deemed fit in the premises.

The Superior Court filed with this Court on the 12th day of August 1975 its "Report and Decision." It answered

the two questions posed by this Court favorably to the appellee and against appellant; first, that the newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rules 59(d) and 60(c), 16 A.R.S., and, second, that the asserted newly discovered evidence was not of such a character as to give reasonable assurance that it would work a different result upon a retrial.[1]

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[1] "The Supreme Court of the State of Arizona having remanded the above entitled matter to this Court for determination of certain matters, the trial Court reports as follows:

In discussing briefly some of the matters considered by this Court in making the determination required by the Mandate of the Supreme Court, this Court will refer to the question of whether or not, pursuant to Rule 60(c), the asserted newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., as the first question. The question of whether or not the asserted newly discovered evidence is of such a character as to give reasonable assurance that it will work a different result upon retrial will be designated as the second question.

In considering the first question, it is clear that the railroad company had numerous special agents, police officers, and a large legal staff in its employ for the purpose of investigating the facts of all cases, and had unusual facilities for discovering the truth and the real facts and for preparing cases for trial. This is amply demonstrated by the results of the efforts of such employees after they began their investigation into the question of the asserted perjury. It is felt that very simple inquiries, in the early stages, directed to one or more of the numerous references set forth by Dickinson in his very detailed 'resume' of his educational background and experience, would have raised enough question that a more complete investigation might have been advisable, with possibly the same findings as revealed by Southern Pacific in this case and by the Defendants in the proceedings in chambers in the case before the Superior Court of San Joaquin County, California, on June 12, 1974. (Torres vs. National Abrasive Company, No. 103899, Dept. 7, San Joaquin County, California, in which the same witness was alleged to have given perjured statements regarding his qualifications.)

The Southern Pacific Transportation Company duly filed its objections thereto, questioning the decision of the court below on both issues.

As to the issue of timeliness, Rule 59(d) provides that a motion for new trial shall be served no later than ten days after the entry of judgment. Appellant urges that

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The Appellant was advised by the Plaintiff about six weeks before trial that Dickinson would testify as an expert in the trial, and his deposition was taken on July 19, 1973, at which time the expert's resume on his educational background, training and experience was furnished Appellant. In the resume, the expert listed, among others, ten other cases in which he had been consulted or testified during the year prior to the resume, cases involving crossing accidents in which the Southern Pacific Company was a Defendant. It is apparent that Mr. Dickinson was not a total stranger to the legal staff of Southern Pacific Company prior to, during and subsequent to the instant trial. There is no showing of what diligence, if any, was used by Appellant to discover the omitted evidence until a short time before the filing of its Motion for New Trial in the Supreme Court on February 18, 1975, or until the expert was unmasked in the San Joaquin County case. No diligence whatsoever seems to have been exercised by the Appellant in inquiring into the qualifications of Dickinson, although it has had, and did have in this case, ample opportunity to do so.

Considering the second question, this Court cannot give reasonable assurance that the asserted newly discovered evidence is of such a character that it will, or would, work a different result upon a retrial.

Casting aside the witness' testimony concerning his educational background and experience, his testimony was merely that of a typical accident reconstruction expert.

As a matter of fact, counsel for the Appellant have never questioned the truth of Mr. Dickinson's material testimony concerning the speed of the train, speed-distance-time calculations, stopping distances, etc. The witness' opinions and conclusions concerning the pertinent portion of his testimony were verified for local trial counsel by the railroad company's representatives in their San Francisco offices. All concerned were satisfied with the conclusions, procedures, formulas used, etc., to the extent that no expert testi-

thirty-eight days elapsed after taking Dickinson's deposition on pre-trial discovery to the date the motion for new trial was filed, and argues that it would have taken more than thirty-eight days to establish that Dickinson committed perjury in testifying as to his qualifications as an expert.

Appellant, however, passes over the express conditions of Rule 60(c). That rule provides that a court may relieve a party of a final judgment within six months after the judgment was entered for:

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many was offered at the trial to contradict his accident reconstruction testimony. There has never been a contention on the part of the railroad that the technical testimony was false or inaccurate, despite the fact that his testimony concerning his credentials may have been false.

The only possible use for the asserted newly discovered evidence would be for the purpose of impeachment. It is indicated that Dickinson's testimony based upon the formulas used, mathematical computations, data used, etc. were in accordance with commonly accepted standards, and would not be expected to be different on a new trial. At least, Appellant has not argued this, and we must therefore assume that it is true.

There would appear to be sufficient evidence in the record as to speed, etc. to justify the verdict even without the testimony of Dickinson.

The Court having heard the argument of the attorneys applicable to the questions submitted to this Court by the Supreme Court for determination under its Mandate, having considered the voluminous record, pleadings, memoranda submitted by the parties, and evidence submitted, the Finding, Judgment and Determination of the Court is as follows:

1. Pursuant to Rule 60(c), the asserted newly discovered evidence *could* have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S.

2. The asserted newly discovered evidence is *not* of such a character as to give reasonable assurance that it would work a different result upon a retrial."

BLEED THROUGH

"(2) newly discovered evidence which by due diligence could not have been discovred in time to move for a new trial under Rule 59(d)."

The trial in this case was concluded on the 17th day of August 1973. It was not, however, until nearly a year and one-half later, on February 18, 1975, that appellant's motion was filed in this Court. Appellant's counsel made no investigation whatsoever of Dickinson's qualifications as an expert before trial or within the six-month period after judgment, but, rather, seems to have fallen heir to an investigation made by counsel in another case then being considered in the superior court in California nearly one year later. The trial court's conclusion that "[n]o diligence whatsoever seems to have been exercised by the Appellant in inquiring into the qualifications of Dickinson" has the complete support of the record.

The appellant states that the trial court determined that the newly discovered evidence would not effect a different result upon retrial. This is not precisely what the trial court said. It specifically reported:

"Considering the second question, this Court cannot give reasonable assurance that the asserted newly discovered evidence is of such a character that it will, or would, work a different result upon a retrial."

Appellant did not at the time of trial question the truth of Dickinson's testimony concerning the speed of the train, speed-distance-time calculations, and stopping distances. It offered no expert testimony to contradict that of appellee's witness. Nor does appellant now assert that Dickinson's technical testimony was false or inaccurate.

We have held that in testing whether a trial court abused its discretion in granting or failing to grant a motion for a new trial:

"* * * we must determine not whether we might have so acted under the circumstances but whether the trial

court in performing the challenged act exceeded the bounds of reason." Bradley v. Philhower, 81 Ariz. 61, 63, 299 P.2d 648.

We think it is aptly stated in Barton v. Plaisted, 109 N.H. 428, 256 A.2d 642, 38 A.L.R.3d 799 (1969) that:

"A new trial will be granted only if specified conditions are met, which include findings that the parties were not at fault in not discovering the evidence at the former trial and that the newly discovered evidence is such that a different result will probably be reached upon new trial."

Both appellant and appellee have submitted extensive memoranda to this Court, that of the appellant objecting to the Report and Decision of the trial court and that of appellee in support thereof. We think, however, it is sufficient to say that the record adequately supports the trial judge and that it is unnecessary to comment further.

Appellant's motions for oral argument and to file a further brief in reply are denied. The judgment of the Superior Court is affirmed.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

Concurring:

WILLIAM A. HOLOHAN, *Justice*
FRANK X. GORDON, JR., *Justice*
JAMES DUKE CAMERON
Chief Justice
JACK D. H. HAYS, *Justice*

* * * *

Motion for Rehearing

(Caption Omitted in Printing)

I. Motion

Comes Now the appellant and moves the Court for an order:

1. To rehear and reconsider its decision, as set forth in its Supplemental Opinion which affirmed the judgment of the trial court as set forth in its Report and Decision, on the grounds that the record of the June 26, 1975, hearing was not before this Court, and therefore, this Court could not determine whether the trial court's decision was supported by the record; consequently, appellant was denied its constitutional right of procedural due process.

2. To rule upon the appellant's motion for an order designating the transcript of said hearing as a part of the record in this matter.

3. To grant a rehearing on the grounds that since the reversal of this case by the Court of Appeals, appellant has been denied the right to appear, brief or orally argue its position at any stage of this proceeding and specifically has been deprived of due process in the following respects:

A. Under Rule 47(b) of the Supreme Court, the appellant was not entitled to object to the granting of the petition for review.

B. Under Rule 47(b) of the Supreme Court, appellant was not permitted to brief its position on review.

C. Although oral argument on the petition for review was requested pursuant to Rule 6 of the Supreme Court, it was not permitted.

D. After the court rendered its opinion reversing the case and remanding it for further hearing a motion for rehearing was filed with request for oral argument. Oral argument was again not permitted and the motion for re-

hearing was denied, not on the merits, but on the ground that it was "disrespectful and abusive".

E. In preparation for the hearing ordered to be held by the trial court to consider the due diligence of the plaintiff in discovering the perjury of appellee's principal witness and the effect of the perjury, appellant attempted to take the deposition of the plaintiff's perjurer and the party who had procured his testimony and was prohibited from doing so by the order of the trial court. The court, by ruling adversely to appellant without permitting said depositions, deprived appellant of due process.

F. Although oral argument on the objection to the trial court's Report and Decision was requested, it was not permitted.

G. To rehear and reconsider its decision, as set forth in its Supplemental Opinion which affirmed the judgment of the trial court. Appellant was deprived of its constitutional right to equal protection and due process of law because the Supplemental Opinion promulgates the doctrines a) that a party having a large investigation staff is held to a higher standard of due diligence and b) that the burden of determining the authenticity of the credentials of an expert witness rests solely on the adverse party, rather than the party tendering the witness.

4. To grant oral argument on the foregoing matters at a time to be fixed by the court.

II. Statement of the Case

On August 17, 1973, a jury verdict was rendered against the appellant Southern Pacific Transportation Company in the amount of $3,080,000. The same jury simultaneously returned a verdict in favor of the Engineer and the Fireman.

On July 11, 1974, Division II of the Appellate Court reversed and remanded for a new trial.

Plaintiff's Motion for Rehearing was dennied by the Appellate Court on September 24, 1974.

Plaintiff's Petition for Review and Request for Oral Argument was filed on October 8, 1974.

The Petition for Review was granted on January 28, 1975. The request for oral argument was denied.

The Supreme Court (without oral argument, rendered a Decision on April 25, 1975, vacating the Court of Appeals Opinion and reinstating the jury verdict against the appellant. The Court remanded this case to the Trial Court for the purpose of a hearing on the question of perjury by plaintiff's expert witness.

Appellant filed its Petition for Rehearing and Request for Oral Argument in the Supreme Court on May 9, 1975.

The Supreme Court denied the Petition without oral argument on June 3, 1975.

On June 12th and 6th respectively, appellant filed notices of taking the deposition of plaintiff's perjurer and the member of the State Bar of Arizona who allegedly procured the "imposter" for plaintiff's attorney. Plaintiff sought a protective order which was considered by the trial court along with several other motions at the hearing.[1]

The mandated hearing was held on June 26, 1975. Appellant produced witnesses and exhibits in support of its position, as did the plaintiff. A copy of the transcript of this hearing was filed with the Superior Court on July 17, 1975.

The Trial Court entered its Report and Decision on August 12, 1975, against the appellant and contemporaneously denied appellant the right to take the depositions of plaintiff's perjurer and Mr. Waag. (See Exhibit 1)

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[1] Appellant's Motion for a Continuance and Motion for Leave to Take Depositions of plaintiff's perjurer and Mr. Waag.

Appellant, on August 22, 1975, filed its Objection to the Trial Court's Report and Decision, and simultaneously filed a Motion seeking the following:

1. An order granting and setting a time for oral argument in this matter;

2. An order granting the appellant the right to file a reply memorandum to the Response of the appellee to the Objections filed herewith to the Trial Court's Findings, Judgment and Determination of August 8, 1975;

3. An order designating the Transcript of the hearing held on June 26, 1975, be made part of the record.

The Supreme Court on October 7, 1975, issued its Supplemental Opinion, again without the benefit of oral argument, and affirmed the Trial Court's Report and Decision. The Court also denied appellant's Motion as to Item #1 (granting oral argument) and Item #2 (granting a right to file a reply memorandum). The Court's Opinion was silent as to Item #3.

III. Statement of Facts

Pursuant to the April 25, 1975 Opinion of the Supreme Court this case was remanded to the Trial Court for hearing on two issues:

a) "Whether the asserted newly discovered evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(d)"; and

b) "Whether the asserted newly discovered evidence (perjury) was of such a character as to give reasonable assurance that it would work a different result upon retrial."

On June 26, 1975, the mandated hearing was held at which time three witnesses were sworn, testimony was taken, and numerous exhibits were admitted into evidence, but appellant was precluded from taking the depositions of the plaintiff's perjurer and Mr. Waag. The transcript of this proceeding was filed with the Superior Court on July 17, 1975.[2] On August 12, 1975, the Trial Court filed its Report and Decision with the Supreme Court. On August 22, 1975, appellant filed its Objections to the Report and Decisions of the Trial Court.

Simultaneously, appellant filed a Motion with the Supreme Court seeking:[3]

1. An order granting and setting a time for oral argument in this matter;

2. An order granting the appellant the right to file a reply memorandum to the Response of the appellee to the Objections filed herewith to the Trial Court's Findings, Judgment and Determination of August 8, 1975;

3. An order designating the Transcript of the hearing held on June 26, 1975, to be made part of the record.

The Supreme Court, by Opinion of October 7, 1975, affirmed the Trial Court's "Report and Decision." The Court denied the appellant's Motion with respect to Item #1 (granting an oral argument) and Item #2 (granting the right to file a reply memorandum). The Court's Opinion was silent as to Item #3.

A thorough search of the record revealed that the reporter's Transcript of Proceedings of the hearing held on June 26, 1975, filed with the Superior Court on July 17,

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[2] Notice of this fact was given to the Supreme Court in a Motion filed by Appellant on August 22, 1975.

[3] A copy of the Motion is attached hereto as Exhibit "2".

1975, has at all times been in the files at the Pima County Court House, at Tucson, Arizona, and was never requested or mailed to the Supreme Court. (See Exhibits 3, 4, and 5 attached hereto.)

The Transcript of Proceedings filed July 17, 1975 included: testimony of Mr. Gino Manicci regarding efforts expended and difficulties incurred in revealing that plaintiff's perjurer was an imposter; and Mr. D. B. Udall's testimony regarding the standard of care, in Pima County, in matters of this nature.

IV. Argument

The Supreme Court's failure to act on Appellant's Motion to designate the June 26, 1975 transcript as part of the record, denied this Appellant of procedural due process, because the Supreme Court could not properly render its decision without the benefit of a complete record. The Supreme Court's remand was specifically directed to the issues upon which the June 26, 1975, hearing was in fact held; failure of this Court to consider the transcript of those proceedings in making its final determination denied this Appellant of a meaningful review and thereby deprived it of its constitutional right to procedural due process. Clearly, predicating a decision upon the "Report and Decision" of the Trial Court is not a substitute for a review of the transcript of proceedings of the June 26, 1975 hearing; nor is the supplementation of the record with affidavits an equivalent of original testimony.

Likewise, the October 8, 1975 Supplemental Opinion of this Court denied Appellant of its right to substantiate due process. The size of Appellants investigatory staff is an improper consideration in determining whether due diligence was exercised in the discovery of new evidence, and denies Appellant of equal pro-

tection and due process of law. Moreover, this Court has relieved the party presenting a witness of his responsibility of insuring that persons authenticity.

A. Procedural Due Process

The right to appeal is part of the substantive law. The Legislature, by A.R.S. § 12-2101, has stated those instances in which the right to appeal from Superior Court exists. *State* v. *Birmingham*, 96 Ariz. 109, 392 P.2d 775 (1964). This Court, under the auspices of that section, initially took jurisdiction and continues to exercise jurisdiction over this appeal. The requirement of due process of law referred to in the Fourteenth Amendment of the Federal Constitution and Art. 2 § 4 of the Arizona Constitution is not confined to the proceedings and judgments of the Trial Court but includes proceedings on appeal in State Courts. *U.S. ex rel. Henderson* v. *Mills*, 21 F.Supp. 616 (1937).

The appellant has been denied procedural due process in ten respects:

1) Under Rule 47(b) of the Supreme Court, the appellant was not entitled to object to the granting of the petition for review.

2) Under Rule 47(b) of the Supreme Court, appellant was not permitted to brief its position on review.

3) Although oral argument on the petition for review was requested pursuant to Rule 6 of the Supreme Court, it was not permitted.

4) After the court rendered its Opinion reversing the case and remanding it for further hearing a motion for rehearing was filed with request for oral argument. Oral argument was again not permitted and the motion for rehearing was denied, not on the merits, but on the ground that it was "disrespectful and abusive."

5) In preparation for the hearing ordered to be held by the trial court to consider the due diligence of the plaintiff in discovering the perjury of appellee's principal witness and the effect of the perjury, appellant attempted to take the depositions of the plaintiff's perjurer and the party who had procured his testimony and was prohibited from doing so by the order of the trial court. The court, by ruling adversely to appellant without permitting said depositions, deprived appellant of due process.

6) Although oral argument on the objection to the trial court's Report and Decision was requested, it was not permitted.

7) To rehear and reconsider its decision, as set forth in its Supplemental Opinion which affirmed the judgment of the trial court. Appellant was deprived of its constitutional right to equal protection and due process of law because the Supplemental Opinion promulgates the doctrines a) that a party having a large investigation staff is held to a higher standard of due diligence and b) that the burden of determining the authenticity of the credentials of an expert witness rests solely on the adverse party, rather than the party tendering the witness.

8) Failure of the Court to rule on appellant's Motion to designate as part of the record the Transcript of Proceeding of the hearing held on June 26, 1975.

9) The Court's issuing its Opinion of October 7, 1975, without the benefit of a complete record.

10) The Court's failure to grant oral argument when properly made pursuant to the Rules of the Supreme Court.

A Court has a positive duty to rule upon motions properly pending before it. *State* v. *Biggs*, 255 P.2d 1055 (1953). The law is well settled that when a trial court has jurisdiction to consider and pass upon a motion, and fails

to do so, a writ of mandamus will issue to force a non-complying court to fulfill its duty. *See e.g., State, ex rel. Juvenile Division of Multnomah City* v. *Clampitt,* 523 P.2d 594 (1974); *Branker* v. *Superior Court,* 332 P.2d 711 (1958); 52 Am.Jur.2d *Mandamus,* § 309. This Court's failure to rule upon a motion pending before it has the ultimate effect of preventing the court from determining this matter on the basis of a complete record, and thereby denies this appellant of its right to procedural due process.

Indeed, if this Court's silence as to appellant's motion is to be interpreted as a denial thereof, then, appellant's right to procedural due process has still been denied. The Court, in its Opinion of April 25, 1975, remanded the matter to the Trial Court for the express purpose of holding a hearing to determine the matters of:

a) Due diligence;

b) Different result.

A hearing was held in which three witnesses testified, numerous exhibits were admitted, and a transcript of proceedings, covering 100 pages, was recorded.

Mr. Gino Manicci testified on behalf of appellant. His testimony reveals the efforts expended and obstacles encountered in discovering that appellee's principal witness was, in fact, a perjurer. Likewise, he testified to the involved details of how plaintiff's perjurer was ultimately uncovered.

Mr. D. B. Udall, an eminent trial lawyer in Pima County, testified regarding the standard of care in matters of this nature in Pima County. Mr. Udall's testimony was particularly favorable to the appellant and went unchallenged at the hearing.

Appellant had sought to take the depositions of plaintiff's perjurer and Mr. Waag to show the following:

1) The full extent of the perjury and its relationship to the outcome;

2) The great lengths to which plaintiff's perjurer went to conceal his true identity;

3) The connection between Mr. Waag (who was assisting plaintiff's counsel in the handling of the case) and plaintiff's perjurer; and

4) Mr. Waag's knowledge or lack thereof as to the plaintiff's perjurers true background.

The testimony of these witnesses and the exhibits introduced at the hearing are crucially relevant to the issues before both the Trial Court and the Supreme Court; it would seem that this Court, having remanded the matter for the taking of evidence would insist on having all available evidence and the transcript of those proceedings, to assess it in the rendition of its final judgment.

The error committed rises to constitutional proportions and denies appellant of its right to procedural due process. Not only must the appellant be afforded an appeal, but that appeal must be meaningful. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). The motion filed by appellant, requesting that the Transcript of the June 26, 1975 hearing be made part of the record, plainly placed the issue of appellant's right to complete and meaningful review before this Court when it stated:

> "Any determination of this case without a thorough review of the Transcript of the June 26, 1975, hearing would constitute a violation of the appellant's rights." And that:
>
> "Due process under the Federal and State Constitutions require that the appellant be given a hearing on its appeal in this matter and that the necessary record be complete so that the Court will have a complete

record before it prior to making its determination." (See Exhibit 2)

Courts have considered the question of whether due process of law has been denied when an appeal is determined on an incomplete record. The usual circumstance, however, arises when counsel for appellant fails to include some relevant document in the record. The Arizona Supreme Court has stated that:

> "It is the responsibility of the defendant to see that all the matters on which he relies for appeal are included in the record or at least explain why it is beyond his ability to procure the entire record. . . . Certainly we will not permit a defendant to claim a want of due process because of the lack of the entire record, which might or might not show error, when he has the means to establish a proper record." *State* v. *Brooks,* 107 Ariz. 364, 365, 489 P.2d 1, 2 (1971).

In this case, the appellant has made the complete record available to the Court with the realization that the Report and Decision of the Trial Court could not be properly reviewed without a complete record. This Court has stated that when there is an incomplete record, it is unable to determine whether any error was committed. *State* v. *Perez,* 7 Ariz. App. 567, 442 P.2d 125 (1968). When the record is before the Court, however, due process of law requires that it be considered by the Court prior to rendering its final determination. In *Kuhn* v. *Ferry & Hensler,* 197 P.2d 792 (1948) appellant requested that the record on appeal be augmented by bringing up certain of the exhibits introduced at trial. The Court, while relying upon a specific rule, stated that:

> "When it appears that proceedings were had or evidence was introduced which should be considered on appeal a denial of the right to augment would be an abuse of discretion." 197 P.2d at 794.

Due process of law requires that the record, upon which a lower court based a decision, be considered by a reviewing court prior to its rendition of a final determination. The Supreme Court of Arizona, in *State* v. *Essman,* 98 Ariz. 228, 403 P.2d 540 (1965), gave a succinct statement regarding due process of law. The Court stated that:

> "Appellant . . . complains of the denial of his right to be heard. Due process of law requires that an accused must be given a full hearing, meeting the requirements of due process. *McGee* v. *Arizona State Board of Pardons & Paroles,* 92 Ariz. 317, 320, 376 P.2d 779, 781. In *McGee* we said '* * * due process of law requires notice and opportunity to be heard, and: * * * there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determination upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.' " 98 Ariz. at 232, 403 P.2d at 543.

The Court's failure to consider the record, by its own definition, has denied this appellant of due process. The Court's review of and reliance upon the Trial Court's "Report and Decision" is not the equivalent to a review of the original Transcript of Proceedings of the hearing held on June 26, 1975; nor is this Court's reliance upon supplemental affidavits a substitute for original testimony. *City of Tucson* v. *Ruelas,* 19 Ariz. App. 530, 508 P.2d 1174 (1973). Appellant respectfully contends that the procedures adopted in the review of this appeal have deprived appellant of its right to due process.

Appellant also maintains that it was denied due process of law because it has never been granted oral argument in this matter. Appellee on October 8, 1974, by his "Petition for Review and Request for Oral Argument" requested oral argument in this matter. Said written request

was never permitted. Appellant, in its Objection filed on August 22, 1975, reiterated its request for oral argument. Oral argument is not a matter of discretion with the Supreme Court, but a matter of right. Rule 6, Rules of the Supreme Court, states that:

> "[a]fter the service and filing of briefs as authorized by these Rules, either party, upon timely request as provided by Rule 25, *will be heard orally.*" (Emphasis added.)

Oral argument is an essential and important part of the procedure to assuring a party's right to due process of law.

Charles C. Bernstein, a former Chief Justice of this Court, stated that:

> "Oral argument is an excellent opportunity for an attorney to bring his case to the undivided attention of the Court. It is a time when both he and the Court can assure themselves that the issues of the case are thoroughly understood by the Court. . . . As a general or perhaps universal rule, counsel should not submit a case for decision without oral argument, and deprive himself of this opportunity to state his position before the Court." Bernstein, *The Disposition of Civil Appeals in the Supreme Court,* 5 Ariz. L. Rev. 174, 187 (1964).

Appellee filed the original request for oral argument; however, appellant had the right to rely, and in fact did rely, upon that request to insure itself the opportunity for oral argument. The procedures prescribed by the Rules of the Supreme Court have been followed. Yet, this Court has never seen fit to permit appellant to present this matter to the Court orally despite the limited briefing privileges afforded by its Rules.

B. Substantive Due Process

The Supplemental Opinion of October 7, 1975 rendered by this Court denies the appellant Southern Pacific Transportation Company of substantive due process and equal protection of the law. First, the size of an investigatory staff of a party to an action has been held to be a proper consideration in determining whether due diligence was exercised. It is now proper for a court to consider the number of special agents, police officers and size of legal staff in determining whether a party has exercised due diligence in discovering that a perjurer has been placed before the court and jury. Second, the party presenting a witness now has no responsibility for vouching for his veracity. Evidently, the adverse party bears both the burdens and the perils of determining whether any given witness is a perjurer.

V. Conclusion

The appellant Southern Pacific Transportation Company has been denied of its right to procedural due process in two respects: First, it has been consistently denied its right to oral argument; Second, the determination of this matter was made without the benefit of an available and complete record thereby precluding its right to a meaningful review.

Likewise, appellant Southern Pacific Transportation Company has been denied of its right to substantive due process by this Court's determination regarding the issues of due diligence and responsibilities of parties presenting witnesses.

Justice Bernstein has stated that motions for rehearing are proper when the:

> "Court apparently failed to realize the full effect of the ruling it handed down."

The Justice also recognizes that:

> "Rehearings are designed to correct mistakes made by the Court, not mistakes made by counsel in the original presentation of the appeal." 5 Ariz. L. Rev. at 189.

Clearly, the Court has failed to realize the ramifications of the decision it has rendered. Moreover, the Court in failing to have the entire record before it, prior to rendering its decision, has violated appellant's right to due process of law.

It is respectfully requested that this Motion for Rehearing be granted and that oral arguments be allowed so that this Court may have the opportunity of reconsidering its Opinion.

Respectfully submitted,

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P. C.
/s/ By RICHARD M. BILBY
Richard M. Bilby
Ninth Floor
Valley National Building
Tucson, Arizona 85701

Appendix

Trial Court Order dated August 12, 1975.

Motion filed in The Supreme Court on August 22, 1975.

Letter from Anne Sellin, Court Reporter, dated October 15, 1975.

Letter from Clerk of Pima County Superior Court dated October 20, 1975.

Letter from Clerk of Pima County Superior Court, Appeals Clerk, dated October 20, 1975.

(Caption Omitted In Printing)

Report and Decision

The Supreme Court of the State of Arizona having remanded the above entitled matter to this Court for determination of certain matters, the trial Court reports as follows:

In discussing briefly some of the matters considered by this Court in making the determination required by the Mandate of the Supreme Court, this Court will refer to the question of whether or not, pursuant to Rule 60(c), the asserted newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., as the first question. The question of whether or not the asserted newly discovered evidence is of such a character as to give reasonable assurance that it will work a different result upon retrial will be designated as the second question.

In considering the first question, it is clear that the railroad company had numerous special agents, police officers, and a large legal staff in its employ for the purpose of investigating the facts of all cases, and had unusual facilities for discovering the truth and the real facts and for preparing cases for trial. This is amply demonstrated by the results of the efforts of such employees after they began their investigation into the question of the asserted perjury. It is felt that very simple inquiries, in the early stages, directed to one or more of the numerous references set forth by Dickinson in his very detailed "resume" of his educational background and experience, would have raised enough question that a more complete investigation might have been advisable, with possibly the same findings as revealed by Southern Pacific in this case and by the Defendants in the proceedings in chambers in the case before the Superior Court of San Joaquin County, California, on June 12, 1974. (Torres v. National Abrasive

Company, No. 103899, Dept. 7, San Joaquin County, California, in which the same witness was alleged to have given perjured statements regarding his qualifications.)

The Appellant was advised by the Plaintiff about six weeks before trial that Dickinson would testify as an expert in the trial, and his deposition was taken on July 19, 1973, at which time the expert's resume on his educational background, training and experience was furnished Appellant. In the resume, the expert listed, among others, ten other cases in which he had been consulted or testified during the year prior to the resume, cases involving crossing accidents in which the Southern Pacific Company was a Defendant. It is apparent that Mr. Dickinson was not a total stranger to the legal staff of Southern Pacific Company prior to, during and subsequent to the instant trial. There is no showing of what diligence, if any, was used by Appellant to discover the omitted evidence until a short time before the filing of its Motion for New Trial in the Supreme Court on February 13, 1973, or until the expert was unmasked in the San Joaquin County case. No diligence whatsoever seems to have been exercised by the Appellant in inquiring into the qualifications of Dickinson, although it has had, and did have in this case, ample opportunity so to do.

Considering the second question, this Court cannot give reasonable assurance that the asserted newly discovered evidence is of such a character that it will, or would, work a different result upon a retrial.

Casting aside the witness' testimony concerning his educational background and experience, his testimony was merely that of a typical accident reconstruction expert.

As a matter of fact, counsel for the Appellant have never questioned the truth of Mr. Dickinson's material testimony concerning the speed of the train, speed-distance-time calculations, stopping distances, etc. The witness'

opinions and conclusions concerning the pertinent portion of his testimony were verified for local trial counsel by the railroad company's representatives in their San Francisco offices. All concerned were satisfied with the conclusions, procedures, formulas used, etc., to the extent that no expert testimony was offered at the trial to contradict his accident reconstruction testimony. There has never, been a contention on the part of the railroad that the technical testimony was false or inaccurate, despite the fact that this testimony concerning his credentials may have been false.

The only possible use for the asserted newly discovered evidence would be for the purpose of impeachment. It is indicated that Dickinson's testimony based upon the formulas used, mathematical computations, data used, etc. were in accordance with commonly accepted standards, and would not be expected to be different on a new trial. At least, Appellant has not argued this, and we must therefore assume that it is true.

There would appear to be sufficient evidence in the record as to speed, etc. to justify the verdict even without the testimony of Dickinson.

The Court having heard the argument of the attorneys applicable to the questions submitted to this Court by the Supreme Court for determination under its Mandate, having considered the voluminous record, pleadings, memoranda submitted by the parties, and evidence submitted, the Finding, Judgment and Determination of the Court is as follows:

1. Pursuant to Rule 60(c), the asserted newly dicovered evidence *could* have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S.

2. The asserted newly discovered evidence is *not* of such a character as to give reasonable assurance that it would work a different result upon a retrial.

DONE IN OPEN COURT this 8th day of August, 1975.

/s/ LLOYD C. HELM
Lloyd C. Helm
Judge

TO: Bilby, Thompson, Shoenhair & Warnock, 2 E. Congress, 9th Floor, Tucson, Arizona 85701

D. Dale Haralson, Esq., 32 North Stone, Suite 703, Tucson, Arizona 85701

Robert G. Begam, Esq. The Association of Trial Lawyers of America, 1400 Arizona Title Building, Phoenix, Arizona 85003

Supreme Court, State of Arizona, Capitol Building, Phoenix, Arizona 85007

Hon. Ben C. Birdsall, Presiding Judge Pima County Courthouse, Tucson, Arizona 85701

Mrs. Elizabeth Urwin Fritz, Clerk of Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

West Publishing Company, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102

EXHIBIT 2

(CAPTION OMITTED IN PRINTING)

Motion

COMES Now the appellant and moves the Court for an order:

1. Granting and setting a time for oral argument in this matter;
2. Granting the appellant the right to file a Reply Memorandum to the Response of the appellee to the Objections filed herewith to the Trial Court's Findings, Judgment and Determination dated August 8, 1975;
3. Designating as part of the record in this matter the Transcript of the hearing held on June 26, 1975.

The requests made herein, where deviant from the Rules of the Supreme Court, are made pursuant to Rule 26 in the furtherance of justice.

Respectfully submitted,

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P. C.

/s/ By RICHARD M. BILBY
Richard M. Bilby
Ninth Floor
Valley National Building
Tucson, Arizona 85701

MEMORANDUM OF POINTS AND AUTHORITIES

This Motion is based upon the record that the Supreme Court has not allowed counsel for either party to be heard in this matter; that the pleadings supporting the Motion for Rehearing have been stricken; that any determination of this case without a thorough review of the Transcript of the June 26, 1975 hearing would constitute a violation

of the appellant's rights; and that the time constraint placed upon the appellant together with the Court's failure to allow it an opportunity to reply to appellee's Response would be unreasonable, unjust and in contravention of the appellant's constitutional rights to a full and fair hearing.

Under the circumstances of this case with so much at stake and the integrity of our court system on the line, as the Court is being asked to put its seal of approval upon a judgment based upon admitted perjury, there can be no valid reason for not granting the Motion in question.[1]

SUMMARY

Due process under the Federal and State Constitutions requires that the appellant be given a hearing on its appeal in this matter and that the necessary record be completed so that the Court will have a complete record before it prior to making its determination.

Respectfully submitted,

BILBY, THOMPSON, SHOENHAIR & WARNOCK, P. C.
/s/ By RICHARD M. BILBY
Richard M. Bilby
Ninth Floor
Valley National Building
Tucson, Arizona 85701

---

[1] Appellant would point out to the Court that it has already paid for and had the Transcript of the testimony at the June 26, 1975 hearing filed with the Clerk of the Superior Court.

EXHIBIT 3

Mr. Richard Bilby
9th Floor
Valley Bank Building
Tucson, Arizona

Re: Transcript of Lueck v. Southern Pacific

Dear Mr. Bilby:

The transcript of Lueck versus Southern Pacific, Case Number 143887, was filed with the Clerk of the Superior Court on July 17, 1975 at 1:13 p.m. with a copy going to Mr. Haralson on September 11, 1975.

Thank you.

Sincerely,

/s/ ANNE SELLIN
Anne Sellin
Court Reporter

STATE OF ARIZONA
COUNTY OF PIMA, ss.

The foregoing instrument was acknowledged before me this 20th day of October, 1975, by ANNE SELLIN.

/s/ DARLA S. WRIGHT
Darla S. Wright
Notary Public

My Commission Expires: 10/7/79.

EXHIBIT 4

OFFICE OF THE CLERK OF THE SUPERIOR COURT
PIMA COUNTY
Tucson, Arizona 85701

October 20, 1975

Bilby, Thompson, Shoenhair & Warnock, P.C.
Ninth Floor Valley National Building
Tucson, Arizona 85701

Re: Melanie Lueck v. Southern Pacific Transportation Company, Superior Court No. 143887

Gentlemen:

You have requested this office to determine whether the "Reporter's Transcript of Proceedings" dated June 26, 1975, and filed in this office on July 17, 1975, in the captioned case, has ever been removed from the permanent file located at the Pima County Courthouse, at Tucson, Arizona.

Whenever a file, or any portion thereof, is physically removed from the Courthouse, a document must be completed evidencing that fact; once completed, the document is then made part of the permanent file. There is no document in our files which would indicate that the June 26, 1975, Transcript of Proceedings was ever taken from the Pima County Courthouse.

Moreover, the permanent file indicates that the record on appeal was returned to the Pima County Clerk of Courts from The Supreme Court of Arizona, via Clifford Ward, Clerk of The Supreme Court, on June 9, 1975. Since that date, there has been no correspondence indicating a request on behalf of The Supreme Court of Arizona for the June 26, 1975 Transcript of Proceedings.

Yours very truly,

CLERK OF THE SUPERIOR COURT
By /s/ FRANCES C. GIBBONS

EXHIBIT 5

(CAPTION OMITTED IN PRINTING)

October 20, 1975

Bilby, Thompson, Shoenhair & Warnock, P.C.
Ninth Floor Valley National Building
Tucson, Arizona 85701

Re: Melanie Lueck v. Southern Pacific Transportation Company, Superior Court No. 143887

Gentlemen:

You have requested that I determine the physical location of the original "Reporter's Transcript of Proceedings" dated June 26, 1975, and filed July 17, 1975, from all times commencing July 17, 1975 to date.

This office maintains a continuing record file which indicates the transmittal of the entire record on appeal, or any part thereof, between this office and the respective Courts of Appeal and/or The Supreme Court of Arizona. By letter of June 9, 1975, Clifford Ward, Clerk of The Supreme Court of Arizona, returned the entire record in the above captioned case to this office. On July 17, 1975, the original Reporter's Transcript of Proceedings, which was conducted on June 26, 1975, in the above referenced case, was filed with this Court.

There is no indication from our records that the Reporters Transcript of Proceedings, dated June 26, 1975, and filed July 17, 1975, has either been requested by The Supreme Court of Arizona or mailed to them.

Our records indicate that the Reporter's Transcript of Proceedings, dated June 26, 1975, has at all times been located at the Pima County Courthouse, Tucson, Arizona.

A certified copy of the record on this matter is attached hereto.

Yours very truly,

CLERK OF THE SUPERIOR COURT
By /s/ RUTH A. GATZHE
Appeals Clerk

File No. 143887

MELANIE LUECK, surviving widow of William Lueck, deceased, *Plaintiff*

vs.

SOUTHERN PACIFIC COMPANY, a Delaware corp., et al., *Defendant*

Appeal filed: October 23, 1973

Bond filed: 10-24-73. Amt.: Supersedes. Kind: Bond

Date due: December 3, 1973

Extended to: January 21, 1974. January 10, 1974.

Date sent to Appeals Court: January 10, 1974.

Returned: Date June 9, 1975.

Disposition: Remanded with Directions

18-119

SUPREME COURT

STATE OF ARIZONA

Phoenix 85007

November 19, 1975

Supreme Court No. 11768-PR

Court of Appeals No. 2 CA-CIV 1578

Pima County No. 143887

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Delaware corporation, *Appellant,*

vs.

MELANIE LUECK in her individual capacity and as surviving widow of William T. Lueck, *Appellee.*

(FILED NOVEMBER 22, 1975)

The following action was taken by the Supreme Court of the State of Arizona on November 18, 1975 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing—DENIED."

Mandate enclosed herewith.

CLIFFORD H. WARD, *Clerk*
By /s/ MARY ANN HOPKINS
Deputy Clerk

To: Harold C. Warnock, Esq. and Richard M. Bilby, Esq., Bilby, Thompson, Shoenhair & Warnock, 2 East Congress, Tucson, Arizona 85701

D. Dale Haralson, Esq., Barber, Haralson, Giles & Moore, 32 North Stone, Suite 703, Tucson, Arizona 85701

Robert Begam, Esq., The Association of Trial Lawyers of America, Arizona Branch, 1400 Arizona Title Building, Phoenix, Arizona 85003

Hon. Lloyd C. Helm, Judge, Cochise County Superior Court, Cochise County Courthouse, Bisbee, Arizona 85603

Hon. Ben C. Birdsall, Presiding Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102

dkb

(Caption Omitted in Printing)

Mandate

To: The Honorable Superior Court for Pima County, Arizona, in relation to Cause No. 143887.

Greeting:

The above cause was presented in your Court and was brought before the Court of Appeals, Division Two, No. 2 CA-CIV 1578, in the manner prescribed by law. That Court rendered its Opinion and caused the same to be filed on the 11th day of July, 1974.

A Petition for Review was granted by this Court on the 28th day of January, 1975. This Court rendered its Opinion and caused the same to be filed on the 25th day of April, 1975. Mandate issued the 4th day of June, 1975.

The Supreme Court rendered its Supplemental Opinion and caused the same to be filed on the 7th day of October, 1975.

A Motion for Rehearing was timely filed and was denied by Order of this Court on the 18th day of November, 1975.

Now Therefore, You Are Commanded that such proceedings be had in said cause as shall be required to comply with the Supplemental Opinion of this Court, a copy of the Supplemental Opinion being attached hereto.

Witness, The Honorable James Duke Cameron, Chief Justice of the Supreme Court of the State of Arizona, this 19th day of November, 1975.

/s/ Clifford H. Ward
Clifford H. Ward, *Clerk*

The original of the foregoing Mandate and copy of the Supplemental Opinion of this Court were mailed to the Clerk of the Superior Court of Pima County, Arizona, this 19th day of November, 1975. A copy of the Mandate was

mailed on said day to Harold C. Warnock, Esq. and Richard M. Bilby, Esq., Bilby, Thompson, Shoenhair & Warnock; D. Dale Haralson, Esq., Barber, Haralson, Giles & Moore; Robert G. Begam, Esq., The Association of Trial Lawyers of America, Arizona Branch; Hon. Lloyd C. Helm, Trial Judge; Hon. Ben C. Birdsall, Presiding Judge, Pima County Superior Court; Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two.

/s/ CLIFFORD H. WARD
Clifford H. Ward, *Clerk*

EXHIBIT 4

OFFICE OF THE CLERK OF THE SUPERIOR COURT
PIMA COUNTY

Tucson, Arizona 85701

October 20, 1975

Bilby, Thompson, Shoenhair & Warnock, P.C.
Ninth Floor Valley National Building
Tucson, Arizona 85701

Re: Melanie Lueck v. Southern Pacific Transportation Company, Superior Court No. 143887

Gentlemen:

You have requested this office to determine whether the "Reporter's Transcript of Proceedings" dated June 26, 1975, and filed in this office on July 17, 1975, in the captioned case, has ever been removed from the permanent file located at the Pima County Courthouse, at Tucson, Arizona.

Whenever a file, or any portion thereof, is physically removed from the Courthouse, a document must be completed evidencing that fact; once completed, the document is then made part of the permanent file. There is no document in our files which would indicate that the June 26, 1975, Transcript of Proceedings was ever taken from the Pima County Courthouse.

Moreover, the permanent file indicates that the record on appeal was returned to the Pima County Clerk of Courts from The Supreme Court of Arizona, via Clifford Ward, Clerk of The Supreme Court, on June 9, 1975. Since that date, there has been no correspondence indicating a request on behalf of The Supreme Court of Arizona for the June 26, 1975 Transcript of Proceedings.

Yours very truly,

CLERK OF THE SUPERIOR COURT
By /s/ FRANCES C. GIBBONS

EXHIBIT 5

(CAPTION OMITTED IN PRINTING)

October 20, 1975

Bilby, Thompson, Shoenhair & Warnock, P.C.
Ninth Floor Valley National Building
Tucson, Arizona 85701

Re: Melanie Lueck v. Southern Pacific Transportation Company, Superior Court No. 143887

Gentlemen:

You have requested that I determine the physical location of the original "Reporter's Transcript of Proceedings" dated June 26, 1975, and filed July 17, 1975, from all times commencing July 17, 1975 to date.

This office maintains a continuing record file which indicates the transmittal of the entire record on appeal, or any part thereof, between this office and the respective Courts of Appeal and/or The Supreme Court of Arizona. By letter of June 9, 1975, Clifford Ward, Clerk of The Supreme Court of Arizona, returned the entire record in the above captioned case to this office. On July 17, 1975, the original Reporter's Transcript of Proceedings, which was conducted on June 26, 1975, in the above referenced case, was filed with this Court.

There is no indication from our records that the Reporters Transcript of Proceedings, dated June 26, 1975, and filed July 17, 1975, has either been requested by The Supreme Court of Arizona or mailed to them.

Our records indicate that the Reporter's Transcript of Proceedings, dated June 26, 1975, has at all times been located at the Pima County Courthouse, Tucson, Arizona.

BLEED THROUGH

A certified copy of the record on this matter is attached hereto.

Yours very truly,

CLERK OF THE SUPERIOR COURT
By /s/ RUTH A. GATZHE
Appeals Clerk

File No. 143887

MELANIE LUECK, surviving widow of William Lueck, deceased, *Plaintiff*

vs.

SOUTHERN PACIFIC COMPANY, a Delaware corp., et al., *Defendant*

Appeal filed: October 23, 1973

Bond filed: 10-24-73. Amt.: Supersedes. Kind: Bond

Date due: December 3, 1973

Extended to: January 21, 1974. January 10, 1974.

Date sent to Appeals Court: January 10, 1974.

Returned: Date June 9, 1975

Disposition: Remanded with Directions

18-119

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1168

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MELANIE LUECK, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Dale Haralson
BARBER, HARALSON & KINERK
82 South Stone Avenue
Tucson, Arizona 85701

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1168

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MELANIE LUECK, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 22 Ariz.App. 90, 523 P.2d 1327 (1974). The opinion of the Supreme Court of Arizona is reported at 111 Ariz. 560, 535 P.2d 599 (1975). The supplemental opinion of the Supreme Court of Arizona is reported at 111 Ariz. 277,

540 P.2d 1258 (1975).

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court denied any due process rights of petitioner by failing to call for a transcript of post trial proceedings, which petitioner did not submit to that court, as part of a unique post appeal review of a new trial motion.

2A. Whether petitioner has any due process right to oral argument before the Arizona Supreme Court in its review of an appeal which was both briefed and argued in the Arizona Court of Appeals.

2B. Whether the Arizona Supreme Court denied any due process right of petitioner by striking a disrespectful and abusive memorandum on rehearing <u>after</u> denying

petitioner's motion for rehearing.

3A. Whether federal due process or equal protection guarantees preclude an appeal court from allowing a trial court to consider evidence of petitioner's special investigative facilities, in determining whether or not petitioner had exercised due diligence to discover evidence of perjury in time to move for a new trial, where no diligence had been exercised.

3B. Whether any federal due process guarantees require deposition discovery to be allowed as a part of unique post trial proceedings.

4A. Whether requiring a party, moving for new trial because of newly discovered evidence, to prove that it could not have discovered the evidence within ten days of trial by using due diligence, shifts

the burden of proof as to a witness' veracity, and if so, whether such a shift of burden in a civil case violates any due process guarantee.

4B. Whether a judgment drawn from a trial in which some of a witness' credentials were falsified, but his substantive testimony was never placed in question, violates any substantive due process or jury trial rights of the losing party, when the falsification was not discovered by either party until long after the trial was concluded.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions are set forth in the Petition at pp. 3-4.

STATEMENT

Respondent sued the railroad in Arizona state court for the wrongful death of her husband, who was killed in a railroad

crossing collision. In August of 1973, the jury awarded both compensatory and punitive damages. At the trial, a Mr. Dickinson testified to establish the speed of the train. That testimony was never disputed by the railroad, and indeed the record shows that the railroad verified Dickinson's opinions and calculations. On July 11, 1974, the intermediate appeals court reversed. Respondent petitioned the Arizona Supreme Court for discretionary review, which was granted. Respondent's request for oral argument on review was not granted. Petitioner made no such request. The case had been argued to the appeals court. The supreme court decided the case on the full briefs and record previously submitted to the appeals court.

During pendency of the appeal to

the Arizona Supreme Court, and nearly a year and a half after the trial of the case, petitioner moved to supplement the record in the supreme court to raise newly discovered evidence that the witness, Dickinson, had falsified certain of his qualifications.

The court vacated the decision of the court of appeals. As the Supreme Court opinion shows (Pet. App. 17a) the verdict against the railroad was sustainable without reference to Dickinson's testimony, the substance of which was, in any event, never challenged.

The court treated petitioner's motion on new evidence as a timely motion for a new trial under Rule 60(c), Arizona Rules of Civil Procedure, 16 A.R.S.,* which it

*Like its Federal counterpart, Rule 60(c) provides in relevant part that a party may be relieved of a final judgment within six

remanded to the trial court for consideration. Under that Rule, the railroad must show both that the evidence was not discoverable by due diligence in time to move for a new trial within ten days of judgment, and that it is of a kind giving reasonable assurances of a different result upon retrial. The court thus afforded petitioner a hearing on its newly discovered evidence which would not have been possible under a literal application of the Rules of Civil Procedure.

The supreme court directed the trial court to advise it of its ruling, and gave both parties ten days in which to file objections and ten days in which to respond to the objections.

months after the judgment was entered for: "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d)."

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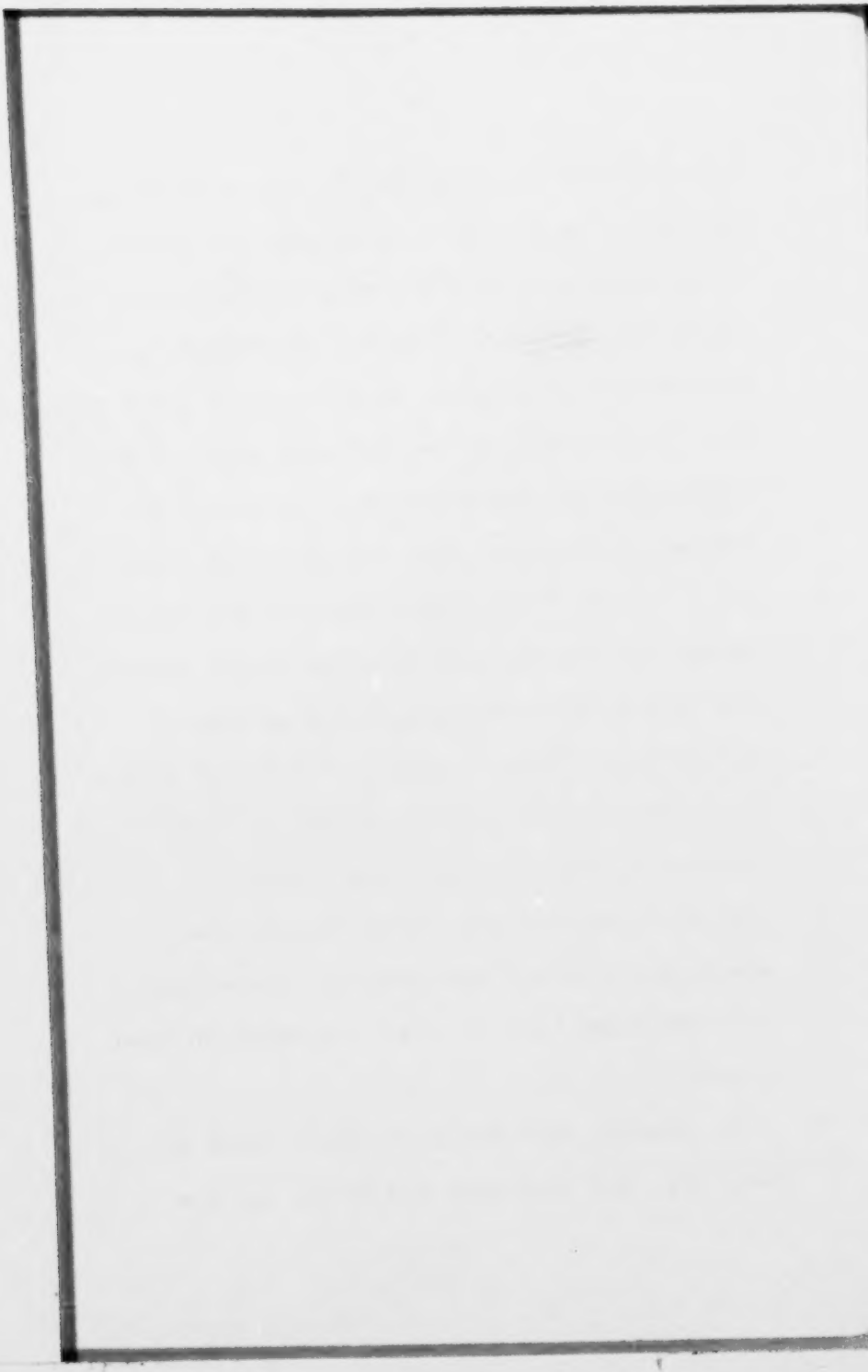
Petitioner filed a motion for rehearing, making no objection to the special procedures ordered. The supreme court denied rehearing and then ordered petitioner's memorandum in support of the motion stricken from the record on the grounds that it was disrespectful and abusive. In its memorandum, petitioner had impugned the integrity of the Vice-Chief Justice and senior member of the Arizona Supreme Court twenty one times, by references such as the following: "Here, again, is another incredible distortion of the record by the Opinion writer." (Pet. App. 35a).

Petitioner did not raise before the court any claimed due process violation arising from lack of oral argument in that court.

On remand, the superior court held a hearing, and received evidence, on the



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two issues mandated by the supreme court.* Prior to the hearing, petitioner sought to depose Dickinson and respondent's legal consultant, a Mr. Wtag, who had introduced Dickinson to respondent's counsel. At the hearing, the attempt to take depositions was heard and subsequently denied. The superior court found that 1) "the asserted newly discovered evidence could have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S.", and 2) "the asserted newly discovered evidence is not of such character as to give reasonable assurance that it would work a different result upon a retrial." (Pet. App. 67a).

The evidence showed that Dickinson had

*The supreme court did not mandate an evidentiary hearing, as petitioner erroneously states (Pet. 2), but left the form of the proceedings to the trial court's discretion. (Pet. App. 60a).

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consulted or testified as an expert witness in ten prior crossing cases against petitioner railroad and that petitioner had unusual investigative facilities for discovering the truth and preparing for trial. The trial court found that simple inquiries would have raised enough question to warrant a more complete investigation, but that petitioner had made no effort whatsoever to inquire into Dickinson's qualifications. (Pet. App. 64a-65a). The trial court found that the newly discovered evidence would not work a different result upon a retrial because it was merely impeachment evidence (petitioner had never contended that Dickinson's substantive testimony was false, and indeed had actually verified his opinions and conclusions for petitioner's trial counsel). The court also found sufficient evidence in the

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record to justify the verdict even without Dickinson's testimony. (Pet. App. 66a).

Objecting, before the supreme court, to the decision of the superior court, the railroad raised no specific federal constitutional objection to the superior court's having heard evidence of petitioner's unusual investigative facilities. Petitioner raised no constitutional claim at all to the court's order that depositions not be taken.

In conjunction with its objections, petitioner asked the supreme court, inter alia, for an order granting oral argument and designating the transcript of proceedings in the superior court as part of the record.

The supreme court affirmed the judgment of the trial court in a supplemental

opinion. The court also denied petitioner's motion for oral argument. No ruling was made on the motion to designate the transcript as part of the record.

Petitioner then filed a motion for rehearing in which it stated:

> "The requirement of due process of law referred to in the Fourteenth Amendment of the Federal Constitution and Art. 2 §4 of the Arizona Constitution is not confined to the proceedings and judgments of the Trial Court but includes proceedings on appeal in State Courts."
> (Pet. App. 101a).

Petitioner went on to list ten respects in which it claimed it had been denied "procedural due process." (Pet. App. 101a-102a). This was its first attempt to raise federal constitutional issues assertedly involved in presented questions Nos. 2B, 3A, 3B, 4A, and the principal part of No. 2A, supra. Presented question

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No. 4B, supra, was never raised below.

Petitioner's motion for rehearing was denied.

ARGUMENT

1. The Transcript. Under Arizona law, as is usually the law on appeals, it was petitioner's duty to designate and place the transcript before the supreme court if it considered the transcript of proceedings essential to review. Haining Lumber Co. v. Octavius Leon, Inc., 70 Ariz. 31, 215 P.2d 909 (1950). There is no provision in Arizona for bringing a transcript before the supreme court by a motion in the supreme court for an order designating the transcript as part of the record. If the supreme court restricted its review to matters properly before it pursuant to state appellate procedure, petitioner cannot complain of a denial of due process.

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Carter v. Illinois, 329 U.S. 173 (1946).

2A. Oral Argument. Petitioner never requested oral argument in connection with the supreme court's review of the court of appeal's decision. Even if oral argument was properly requested and required by Arizona appellate rules (which it was not)* the failure to grant oral argument did not violate petitioner's right to due process. Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969), cert. den., 394 U.S. 1012 (1969). Nor did the lack of oral argument at subsequent stages of review in the supreme court deny petitioner its right to due process. Price

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*Respondent's request was not made "by separate instrument", Supreme Court Rule 25, 17A Ariz.Rev.Stat., nor is oral argument contemplated for proceedings other than those formally briefed, (Supreme Court Rule 6, ibid), i.e., appeals and not later proceedings.

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v. Johnston, 334 U.S. 66 (1948); cf. Eldridge v. Weinberger, ____ U.S. ____ (1976). Additionally, petitioner's claim that it was denied due process by the lack of oral argument on review was not timely raised in the supreme court.

2B. Striking the Abusive Memorandum. Petitioner contends that its "motion [for rehearing] was stricken from the record"; that "the only legal brief it submitted had not been considered but was stricken"; and that these "procedural defects" were "thrust upon petitioner" and violated its constitutional rights. (Pet. 13). Petitioner's motion was denied, not stricken. Its memorandum in support of the motion was then stricken as disrespectful and abusive -- a circumstance that refutes petitioner's absurd claim that it "had not been considered."

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The railroad cites no authority for its claimed denial of due process on this issue, nor do we think there is any to cite.

This Court has never held that a state supreme court cannot protect itself from scurrilous attack by counsel. It will be a sad day for the principles of comity and federalism if ever this Court should question the power of a state supreme court to strike a memorandum resembling that stricken by the Arizona Supreme Court.

3A. Equal Protection. Petitioner refers to the supreme court's "conclusion that the number of special agents, police officers and legal staff available to [petitioner] is rationally related to the question of petitioner's exercise of due diligence" (Pet. 14-15), and contends that "the classification promulgated by the Supreme Court of Arizona" (Pet. 14) violates

petitioner's constitutional rights to due process and equal protection.

This is a counterfeit issue. The supreme court made no such conclusion and "promulgated" no such "classification." In fact, except by footnote, the supreme court never mentioned these matters, and that footnote drew no classifications.

Petitioner raises no issue under the equal protection clause because petitioner makes no showing that someone comparably situated has been treated differently. National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954). Nor does it show that separate and distinct classifications exist. San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973).

The trial court's hearing of evidence on the railroad's special resources in connection with the due diligence issue was

no classification at all, but was merely the addition of relevant evidence.

Whatever constitutional issue petitioner now seeks to manufacture from this circumstance, it was not raised in petitioner's objections submitted to the supreme court, and thus was not timely raised below.

3B. Constitutional Right of Discovery. Petitioner contends that the trial court's refusal to permit it to depose Dickinson and Waag deprived it of due process. Again petitioner seeks review by this Court of matters which were not timely presented below. The railroad presents no authority for the proposition that deposition discovery is mandated by the Fourteenth Amendment and this Court has never so held.

The railroad has not shown that it could not provide testimony by calling these witnesses to the hearing, but since it concedes

that their evidence would relate to whether due diligence in challenging the witness would have been successful, (Pet. 15) the issue is of no moment. The trial court found there was no diligence. (Pet. App. 65a).

4A. "Shifting the Burden" of Testing Witness Veracity. Petitioner claims that it was denied due process because the supreme court shifted the burden of determining the veracity of respondent's expert witness to the railroad. (Pet. 15). Although petitioner claims that this issue was raised below (Pet. 7) reference to the pertinent page of its "Objection to Finding, Judgment and Determination of Trial Court" (Pet. App. 76a) will show that it was not. Review is precluded.

The Arizona courts were doing nothing more than requiring the moving party to prove its case, in a motion brought under Arizona's

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counterpart of Federal Civil Rule 60(c), that it exercised due diligence to discover new evidence within six months after judgment. On this issue, the trial court found, based on undisputed evidence, that petitioner exercised no diligence at all during the six-month period, and indeed for nearly a year thereafter. The supreme court accordingly concluded that "[petitioner's] counsel made no investigation whatsoever of Dickinson's qualifications as an expert before trial or within the six-month period after judgment. . . ." (Pet. App. 93a). Since petitioner has never challenged the application of Rule 60(c) to the determination of its motion for a new trial, petitioner raises no question regarding the "due diligence" test conceivably warranting this Court's determination.

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4B. Substantive Due Process and the "Jury Trial" Issue. Petitioner presents the question "whether petitioner was denied substantive due process by the Supreme Court of Arizona's decision. . . that a jury verdict premised on perjured testimony is not inherently of such character to give a reasonable assurance that upon retrial a different result would ensue." (Pet. 3). The question was never raised below, and petitioner even now does not attempt to argue in its petition why this question warrants this Court's review. Petitioner merely asserts that permitting such a verdict to stand is "wrong." Of course, "substantive due process" has long been discarded as authority for reviewing state action. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

The Arizona court never found that the verdict was "premised on perjured testimony" (Pet. 3) or "predicated upon perjured testimony" (Pet. 17). The railroad has never denied the truth of Dickinson's substantive testimony (Pet. App. 66a) nor challenged the finding that the only possible use for the newly discovered evidence would be for the purpose of impeachment. The supreme court's affirmance is therefore in accord with the universally recognized rule that newly discovered evidence which goes merely to attack the credibility of a witness is not grounds for a new trial. Petitioner would have this Court jettison this rule as violative of due process, and adopt a rule that no verdict can stand on a showing (made even a year and a half after judgment) that false, immaterial testimony was given at the trial. However, due process

has never been construed as guaranteeing a completely perjury-free trial. Thompson v. Butler, 136 F.2d 644 (8th Cir. 1943), cert. den. 320 U.S. 761 (1943), reh. den. 320 U.S. 813 (1943).

Petitioner also contends that the supreme court denied its right to a jury trial by sustaining a verdict after a trial in which false testimony was given. (Pet. 16-17). This preposterous claim raises no federal question. There is no federal constitutional right to a jury trial in a civil action in a state court. Time, Inc. v. Firestone, ____ U.S. ____ (1976); Melancon v. McKeithen, 345 F.Supp. 1025 (E.D.La. 1972), aff'd Mayes v. Ellis, 409 U.S. 943 (1972), Hill v. McKeithen, 409 U.S. 943 (1972) and Davis v. Edwards, 409 U.S. 1098 (1973). Nor does the due process clause of the Fourteenth Amendment guarantee a jury

trial to a litigant in a civil action in a state court, Iacaponi v. New Amsterdam Casualty Co., 258 F.Supp. 880 (W.D.Pa. 1966), aff'd 379 F.2d 311 (1967), cert. den. 389 U.S. 1054 (1968). Moreover, not only was this question never raised by petitioner in any state court, it is also not set forth in the petition as a question presented for review, and thus may not be considered by this Court. Rule 23(1)(c), Rules of Supreme Court.

This case involves unique post appeal procedural questions not representative of general problems in the judiciary of the several states. Nor are such questions likely to reoccur. Moreover, petitioner's questions presented for review all derive either from self-assumed rights, from petitioner's own misconception of the action taken by the supreme court, or from

petitioner's own mistakes, omissions and misconduct in the supreme court. The petition is utterly devoid of any "special and important reasons" for this Court to exercise its discretion to grant review on this Petition. Rule 19(1), Rules of Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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